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No.

In the Supreme Court
OF THE
United States

79-1996

OCTOBER TERM, 1979

DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO,
Petitioner

v.

THE SACRAMENTO COUNTY CIVIL SERVICE COMMISSION, and
THE SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, District Attorney of Sacramento County, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of California.

OPINION BELOW

The opinion of the Supreme Court of the State of California in this matter entitled *Price v. Civil Service Commission* is reported at 26 Cal.3d 257, 161 Cal.Rptr. 475, 604 P.2d 1365 and is set forth at page A-1 in Appendix A to this petition. The opinion of the Court of Appeal for the State of California, Third District, in this matter is reported at 77 Cal.App.3d 234, 143 Cal.Rptr. 483, and is set forth at page A-68 of Appendix A. The opinion of the Sacramento Superior Court, which is unreported, is set forth at page A-86 of Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of California was dated and entered January 25, 1980. A Petition for Rehearing was filed on February 11, 1980 and on February 19, 1980 the time for granting or denying the Petition for Rehearing was extended to March 25, 1980. On March 20, 1980 the Petition for Rehearing was denied.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 in that the Supreme Court of the State of California, in its decision in this matter, ruled that Sacramento County Civil Service Rule 7.10 violated neither the Fourteenth Amendment of the Constitution of the United States nor the Federal Civil Rights Act.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Federal Civil Rights Acts prohibit the involuntary, public employment, minority quota hiring program mandated by the Sacramento County Civil Service Commission.

B. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the involuntary, public employment, minority quota hiring program mandated by the Sacramento County Civil Service Commission.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Set forth in Appendix B are the pertinent provisions of the Fourteenth Amendment to the United States Constitution; the following provisions of the Federal Civil Rights Act of 1866 as amended in 1964 and 1972: 42 U.S.C. 1981; 42 U.S.C. 2000e-2(a), (b), and (j); 42 U.S.C. 2000-5(g); and Rule 7.10 of the Sacramento County Civil Service Rules.

STATEMENT OF THE CASE

Summary

In late 1972, the Sacramento County Civil Service Commission (hereinafter Commission), under authority delegated to them by the Sacramento County Board of Supervisors, promulgated Rule 7.10 (hereinafter Rule, and set forth in Appendix A, page A-94) entitled "Minority Preference Appointment", establishing within the county civil service system a minority[1] hiring procedure. The Rule permitted the Commission, after conducting hearings and issuing findings, to order a county agency to hire minorities

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[1]Rule 7.10 defines "minority personnel" to include Blacks, Indians, Mexican-Americans, Spanish-Americans, Orientals, other non-Whites, and women.

on the basis of an alternating ratio with non-minorities. In September, 1975, after holding hearings concerning the small number of minority attorneys in the three county law offices[2], the Commission found, among other things, that there had been unintentionally discriminatory employment practices[3] by Sacramento County and Petitioner, and ordered (Findings and Order set forth in Appendix C) Petitioner to appoint minorities (other than women[4]) to the Attorney I (entry level) classification on an alternating ratio of 2:1 (at least one minority for each two non-minorities) until the percentage of minority attorneys in the Attorney I and II classes reached eight percent. Petitioner sought, and received, from the trial court, an order prohibiting the implementation of the Rule. That ruling was affirmed by the California District Court of Appeal and was reversed by the California Supreme Court in a four to three decision, and remanded to the Trial Court for a review of the sufficiency of the evidence.

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[2]Although the Commission investigated alleged underrepresentation of minorities in the offices of the Sacramento District Attorney, Public Defender and County Counsel, they issued a minority quota order directed only to the District Attorney. They concluded that the Public Defender had cured any underrepresentation and that it was impractical to issue any order to the County Counsel because of low turnover of attorneys in that office.

[3]Rule 7.10 defines "discriminatory employment practices" as "the use by the County of selection methods or selection criteria not related to the job".

[4]Women were not a part of the order, directed to Petitioner, which is the basis for this action.

Background

The Petitioner is an elected official serving an urban population of 700,000 consisting of approximately 19.5 percent minorities (other than women). He is sworn to uphold the constitutions of both California and the United States and is authorized to appoint deputies "for the prompt and faithful discharge of the duties of his office." (California Government Code, § 24101) All of the sixty-five deputies district attorney he employed at that time (except for his assistant) were a part of the county civil service system.

Sacramento County's civil service system is "traditional" in that it is career oriented, and all appointments to county employment are to be "based upon relative fitness as ascertained by competitive examinations." (Sacramento County Charter 71-F(a)). The Civil Service Commission Rules state in Rule 5 that "[i]t is the policy of the county to seek the best qualified persons available . . ." Both the County Charter and the Civil Service Rules prohibit favoritism or discrimination[5]. All applicants for county employment must

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[5]Sacramento County Charter 61: "No person in the classified or unclassified service, or seeking admission thereto shall be appointed, reduced, removed, or in any way favored or discriminated against because of his race, color, creed, sex, national origin or political affiliation. The provisions of this section are not intended to prevent the establishment of special limited programs for the employment of economically, socially, physically or mentally deprived persons."

Sacramento County Charter 71-F(f): "No person in county service, or seeking admission thereto, shall be appointed, reduced, removed, or in any way favored or discriminated against because of his race, color, sex, national origin or political affiliation. This provision is not intended to prevent the establishment of special

pass a competitive examination. After the examination, the names of the applicants who pass are placed on a list with the highest scores at the top. Persons with the same score are considered to be in the same "rank" and, when an employment opening occurs, the appointing authority (county agency) must appoint from one of the names in the top three ranks.[6] The name of any candidate who either is appointed or who refuses an offer of employment must be stricken from the list. This permits others below the initial three ranks to be "reachable".[7] The rationale for these testing, ranking and appointing procedures is that they give the appointing agency some limited discretion in hiring, assures that the most qualified persons will be hired, and prevents appointments either for political reasons or for reasons other than merit (such as for race).

The Commission, appointed by the Board of Supervisors, consists of five members whose only qualifications are that they be qualified electors within the county and not be salaried county employees. The Board of Super-

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programs for the employment of economically, socially, physically, or mentally deprived persons."

Sacramento Civil Service Rule 5.1: "It is the policy to seek the best qualified persons available for each job in County Service, and to encourage persons to compete for the best jobs for which they are qualified without regard to race, color, religion, sex, national origin or political belief."

[6]The requirement to appoint from the top three ranks is known as the "rule of three". Civil Service Rule 7.4 provides that "it is intended that . . . the appointing power shall have the choice of any of the persons whose names appear in any of the three highest ranks on the eligible list."

[7]As persons within the first three ranks are either hired or refuse an appointment, their names are stricken. As a complete rank is eliminated, persons in the next lower rank become "reachable", i.e. are now in one of the top three ranks.

visors has delegated to the Commission the duty of overseeing the county civil service system.

Rule 7.10—Minority Preference Appointment

Early in 1974, in response to concerns of local minority groups about the underrepresentation of minorities in county employment, the Commission adopted Rule 7.10 which provided in part:

> "(a) The purpose of this rule is to provide a procedure for the adjustment of disproportionate representation of minority personnel, which is a result of discriminatory employment practices."
>
> "(b) As used in this rule:
>
> (1) "Minority personnel" includes, but is not necessarily limited to Blacks, Indians, Mexican-Americans, Spanish-Americans, Orientals, other non-Whites and women.
>
> (2) "Discriminatory employment practice" means the use by the County of selection methods or selection criteria not related to the job.
>
> (3) "Alternating ratio" means a ratio indicating a number of minority persons who shall be appointed to a classification for a given number of non-minority persons appointed to the classification."
>
> "(c) The findings required by this rule shall be made separately in relation to each classification after a public hearing at which interested persons are afforded an opportunity to be heard and to present evidence. The Commission may order minority appointment preference . . . if it finds that:
>
> (1) The number of minority personnel in a classification is disproportionately low in relation to the population mix of the County of Sacramento. . . .
>
> (2) The disproportionate representation was caused by discriminatory employment practices; and

(3) It is feasible to adjust the disproportionate representation. . . ."

"(d) If the Commission makes the findings required by this rule, it may order that minority personnel shall be appointed . . . with an alternating ratio until a specified number of minority persons have been appointed to the classification. The Commission's order shall specify:

(1) The minority group or groups included in the order;

(2) The total number of such appointments, . . .

(3) The alternating ratio to be used, taking into consideration the population mix of the County, the number of minority persons who can be reasonably expected to apply and qualify, . . .

(4) Any other requirements which the Commission determines are reasonably necessary. . . ."

• • •

"(g) The Director of Personnel Management shall certify for appointment minority persons from the eligible list . . . ahead of non-minority persons only when necessary to implement the requirements of the Order."

Facts of this Case

Between April, 1974, and September, 1975, the Commission held non-adversary hearings concerning the underrepresentation of minority attorneys in the District Attorney's Office. At that time, one (about 1.5 percent) of the deputies in Petitioner's office was a minority. The best estimates were that approximately 7 percent of the attorneys in California, at that time, were minority.

During that time period, the examination[8] for attorney positions consisted of an oral interview by a panel of four persons. The panel was comprised of an attorney from the District Attorney's Office, an attorney from the Public Defender's Office, a representative from the county Office of Personnel Management, and a member of the local, private bar. After the interview, each panel member assigned the applicant a score ranging from one to one hundred (seventy was passing). Each score was based upon the panel member's evaluation of the applicant's education, experience, knowledge of the law, demeanor, and possession of those skills required for a prosecutor. The four scores which the candidate received were then averaged and rounded off to the nearest whole number. Those who passed were then placed on a list of eligibles in the order of their scores on the examination.

In early 1975, a campaign by Sacramento County, Petitioner and the Sacramento Public Defender was conducted in an effort to recruit minority attorneys. This campaign resulted in an attorney eligibility list which contained 12.7 percent minorities. Both the District Attorney and the Public Defender hired several attorneys from that list. Ultimately, five minority attorneys became "reachable" by the Petitioner, who offered positions to four of them. However, all four declined (two accepted positions with the Sacramento Public Defender and two accepted positions in

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[8]Civil Service Rule 5A provides that the Director of Personnel Management determine which examination shall be given for a particular job classification. It also provides for the composition of the oral panel and requires that at least one panel member be from a minority group. In fact, two members of the attorney classification panel were minorities.

Southern California). The fifth was not offered a position by Petitioner or any Sacramento County agency.

When the recruitment campaign failed to increase the number of minority attorneys in Petitioner's Office, the Commission, on September 25, 1975, issued Findings and an Order. The Commission had listened to unsworn testimony from approximately 45 witnesses (none of whom claimed to be a victim of discrimination by Petitioner), and received 219 pages of documents and letters. The Findings and Order are summarized as follows:

Findings:

A. The affirmative action needs of women are unclear and no order will be made as to them.

B. Minorities are substantially underrepresented in the Office of the District Attorney in that only one attorney (1.5 percent) is a minority and approximately 19.5 percent of the Sacramento County population is minority.

C. There is no evidence of intentional discrimination.

D. There is evidence of unintentional discrimination based upon:

1. Sacramento County's traditional civil service system.

2. Oral only examinations which have never been "validated".[9]

3. There has not been a special effort to recruit minorities.

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[9]In the parlance of equal opportunity legislation, a validated test is one which demonstratably tends to test ability to perform a job.

4. The failure by the District Attorney to offer civil service appointments to minority persons in the legal trainee positions.

E. It is feasible to recruit and hire minority attorneys.

Order:

A. Appointments to the class of Attorney I in the District Attorney's Office shall be made on a 2:1 ratio so that at least one minority person is appointed for every two non-minority persons.

B. The ratio shall be applied only until the percentage of minorities in the classes of Attorney I and II in the District Attorney's Office is eight percent.

C. A minority group shall not receive preferential treatment if it is already adequately represented in the attorney classes.

The Order required Petitioner to hire attorneys solely on the basis of race and regardless of their relative fitness to perform the work as compared with non-minorities who must be passed over. The effect was to require Petitioner to hire at least one minority (excluding women or members of a minority group which was already adequately represented) for each two non-minorities hired. For example, if there were no minority attorneys within the top three ranks of the list, Petitioner would have had to make an appointment from a lower rank, regardless of how far down the list the minority's name appeared. Also, if no minority appeared on the list who was willing to accept a position as a prosecutor in Petitioner's office, no attorneys could be hired until a new list was created.

State Court Proceedings

In October, 1975, Petitioner sought and received a Writ of Mandate/Prohibition from the Sacramento Superior Court. Petitioner contended, among other things, that Rule 7.10, on its face, violated State and Federal equal protection guarantees and violated the provisions of the Federal Civil Rights Act. The Trial Court found that the Rule, on its face, violated constitutional provisions against discrimination based upon race or national origin. Respondent (Appellant below) appealed, and on January 30, 1978, the California Third District Court of Appeals affirmed the trial court's ruling, and found that Rule 7.10 violated the provisions of the Sacramento County Charter and Title VII of the Federal Civil Rights Act. Respondents appealed to the California Supreme Court. Petitioner (Respondent below) contended, among other things, that the Rule violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Title VII of the Federal Civil Rights Act. On January 25, 1980, the California Supreme Court reversed the Trial Court and ruled, in a four to three decision, that Rule 7.10 did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or Title VII of the Federal Civil Rights Act, or any other applicable law. On March 20, 1980, Petitioner's Petition for Rehearing was denied and the Dissenting Opinion modified.

REASON FOR GRANTING THE WRIT

The effect of permitting the California Supreme Court decision to stand is enormous: *It mandates the government, which is supported through taxes by persons of*

every race, color, or national origin, to blatantly discriminate, in public employment, against its citizens. Such a mandate is contrary to basic premises upon which our society is based: that everyone is entitled to be treated equally by the government, and that public employees are to be chosen on the basis of their relative merit *and for no other reason.* The idea that applicants for public service may be excluded from consideration *solely* because of their race or national origin, is repugnant to a free society.

In this particular case, the Petitioner, an official elected by the citizens of his community, sworn to uphold the laws of the land to the best of his ability, has been ordered to abandon his obligation to his electorate to appoint the best qualified prosecutors available, and instead, to select attorneys based upon the color of their skin or the heritage of their parents. Furthermore, this Rule and Order was made by a Commission whose members have not been elected by the people, after hearings which provided virtually no procedural safeguards, and without the identification of any particular alleged victims of discrimination. Although the stated purpose for Rule 7.10 is the correction of underrepresentation of minorities in county employment because of discriminatory employment practices, it is obvious from the entire record that the true goal of the Rule is to create a racially proportionate allocation of public jobs at the expense of the quality of government service and the rights of our people.

Neither the United States Constitution nor Federal law permits the discrimination which the Commission has ordered.

> *"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored."*[10]

I

FEDERAL CIVIL RIGHTS ACTS PROHIBIT THE MINORITY QUOTA HIRING PROGRAM MANDATED BY THE COMMISSION

The 1972 Amendment of Section 701, Title VII of the Federal Civil Rights Act of 1964, extended to state and local governments the prohibition of segregating or classifying employees or applicants in a manner which tends to deprive an individual of an employment opportunity because of his race, color, religion, sex or national origin under section 703(a) of Title VII (42 U.S.C. § 2000e-2(a) and (b)). *Monell v. Department of Social Service of the City of New York* (2nd Cir. 1976) 532 F.3d 259, 261. Rule 7.10 and the orders it permits, violate the explicit prohibitions of the Federal Civil Rights Acts by injecting racial, ethnic and gender qualifications into a hiring system.

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[10]Professor Alexander Bickel, Morality of Consent, page 133 (1975).

Section 703(j) of Title VII (42 U.S.C. § 2000e-2(j)) declares that nothing in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of . . . race, color, religion, sex or national origin . . . on account of any imbalance which may exist with respect to the . . . percentage of persons of any race, color, religion, sex or national origin employed by an employer . . . in comparision with the . . . percentage of persons of such race, color, religion, sex or national origin in any community . . . or in the available work force . . ."

The congressional history of the Civil Rights Act of 1964 reveals that the ardent proponents of the bill assured their colleagues that racial quotas were not contemplated by the legislation. As Senator Humphrey explained, "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." (Remarks of Senator Humphrey, 110 Cong. Rec. 12723, June 4, 1974; EEOC Legislative History.) These sections clearly prohibit the numerical hiring scheme embodied in Rule 7.10 and the order directed to Petitioner. The scheme makes minority status a qualification for each third opening in the Attorney I class in Petitioner's office. Non-minorities are deprived of eligibility for that third position regardless of their qualifications relative to minorities on the eligibility list. This is entirely inconsistent with

the holding of *McDonald v. Santa Fe Transportation Company* (1976) 427 U.S. 273 wherein this Court unanimously held that Title VII is not limited to discrimination against members of any particular race, and that white employees are entitled to relief when they are victims of racial discrimination.

Hiring quotas are incompatible with recent U.S. Supreme Court cases on Title VII. *Albermarle Paper Co. v. Moody* (1975) 422 U.S. 405, 421, held that the scope of relief under Title VII, "is intended to make the victims of past discrimination whole." In *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, and *International Brotherhood of Teamsters v. U.S.* (1977) 431 U.S. 324, this Court held that the appropriate remedy for past discrimination is to restore the victims of such discrimination to their rightful places. This Court also pointed out that non-victims of discrimination would not be entitled to preferential relief. *Teamsters, supra,* at 772. Further evidence that Title VII is directed towards the individual and not a group is found in *Furnco Construction Corporation v. Waters* (1978) 438 U.S. 567, wherein this Court stated:

> It is clear beyond a cavil that the obligation imposed by Title VII is to provide for equal opportunity for each applicant without regard to whether members of the applicant's race are already proportionately represented in the work force.

And in *City of Los Angeles v. Manhart* (1978) 435 U.S. 702, the Court again made the point that Title VII pertains to the individual rather than to a group saying:

> The statute (Title VII) makes it unlawful 'to discriminate against any individual with respect to his

> compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin' (citations omitted). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class.

In *Griggs v. Duke Power* (1971) 401 U.S. 424, 431, the Court stated the same proposition saying:

> In short (Title VII) does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

A quota such as the quota imposed by Rule 7.10 is directed to a group rather than to an individual victim of discrimination, as required by Title VII and the cases which interpret it. Quotas have the practical effect of creating victims of discrimination rather than being a remedy for discrimination victims. It is inequitable that innocent parties should give up what they have not gained as a result of discrimination, so that others can gain what they have not lost as a result of discrimination.

The California Supreme Court majority opinion in this matter seems to lean heavily on the United States Supreme Court decision in *United Steelworkers, etc. v. Weber* (1979) ..... U.S. ....., 99 S.Ct. 2721. Although five justices did uphold a racial classification program at a Kaiser Aluminum Plant, the majority opinion stressed that it was factually inapposite to a compulsory program involuntarily imposed on and by a public agency. Justice Brennan, writ-

ing the lead opinion in which Justices Stewart, White, Marshall and Blackmum joined, declared repeatedly that the Kaiser plan "does not involve state action." The opinion is replete with references to the fact that the parties (in *Weber*) voluntarily agreed to undertake that program. It is significant that Justice Brennan in his *Weber* opinion did not quarrel with *McDonald*. In fact, he found *McDonald* not to be controlling because the Kaiser plan in Weber was "voluntarily adopted by private parties."

The language of the Civil Rights Act and its amendments, its legislative history, and the cases interpreting the Act lead to the inescapable conclusion that Rule 7.10 is in direct conflict with federal law and cannot remain in force.

II

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROHIBITS THE MINORITY HIRING PROGRAM MANDATED BY THE COMMISSION

The essence of the Fourteenth Amendment's Equal Protection proscription that no state " . . . shall deny any person within its jurisdiction the equal protection of the law" was stated in *Washington v. Davis*, (1976) 426 U.S. 229, 239:

> The central purpose of the Equal Protection Clause . . . is prevention of official conduct discriminating on the basis of race.

Because of the invidious nature of racial classifications, they:

> . . . are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.
>
> *Washington v. Davis, supra* at 242

The "strict scrutiny" test is applicable to racial classifications (those which treat similarly situated persons differently because of race) because such classifications are repugnant to the concept of equality embodied within the Fourteenth Amendment, and are deemed "suspect." The fact that non-minorities, rather than minorities, suffer the discrimination by such classifications does not remove them from the Equal Protection's purview.

As this Court stated in *Regents of the University of California v. Bakke* (1978) 438 U.S. 265, 289-290:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Rule 7.10, and the Commission's Order, created classifications, in fact quotas, based upon race and national origin. For example, given three openings, if Petitioner appointed two non-minority[11] deputies based upon their merit and

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[11]The "availability" of minority attorneys is a significant aspect of the Commission's Order. In fact, Petitioner offered positions to four out of five "reachable" minority attorneys in early 1975, but all four declined to accept an appointment. The fifth was not offered a position because of his poor performance as a Student Intern. From these facts, the Commission concluded that the Petitioner discriminated. In reality, the percentage of minority attorneys in Petitioner's Office did not increase because particular minority attorneys, for whatever reasons (pay, weather, other opportunities, etc.), chose not to accept a position as a prosecutor in Sacramento.

availability,[12] non-minorities would be excluded from consideration for the third opening *solely because of their race or national origin.* Conversely, only minority attorneys (except those belonging to a minority group already adequately represented) would be eligible for appointment regardless of their examination score and rank on the eligibility list. Other than passing the examination, their sole qualification would be their race or national origin.

This racial classification is directly opposite to the majority holding in *Regents of the University of California v. Bakke, supra.* In *Bakke,* Justice Powell in his lead opinion for himself and for Chief Justice Burger, Justices Stewart, Rehnquist, and Stevens wrote: "In summary, it is evident that the Davis special admissions program involves the use of an *explicit racial classification* never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class . . . *The fatal flaw in* [*the Davis*] *preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.*" (438 U.S. at 319-320; emphasis added)

There is no evidence that the Petitioner actually discriminated against any attorney or that any minority attorney decided not to work in Petitioner's Office because of unfair or unequal treatment.

[12]The Commission's Order 3. (Appendix, page A-104) provides that any particular minority group which is already adequately represented will not receive minority preference. This would lead to the unusual situation in which a minority, under the definition of the Rule, would be discriminated against under the operation of the Rule, because his minority group had reached its *proportionate percentage.*

When a person has been totally deprived of benefit or right because of governmental racial classification, the "strict scrutiny" test has always been applied. *Katzenback v. Morgan*, (1966) 384 U.S. 641. This Court has consistently struck down classifications based upon race as furthering no compelling state interest. *Shapiro v. Thompson*, (1969) 394 U.S. 618. Such racial classifications have not been found to meet the strict scrutiny test except in time of war when national security was involved. *Korematsu v. United States* (1944) 323 U.S. 214. The burden is on the government (Commission) to show that the classification meets the strict scrutiny standards. *Dunn v. Blumstein* (1972) 405 U.S. 330, 342-343. Therefore, the Commission must demonstrate that it is furthering a *compelling state interest* and that Rule 7.10 is a *necessary means* to accomplish that end. *Loving v. Virginia* (1967) 388 U.S. 1, 11; *Washington v. Davis*, supra.

There is *no compelling state interest* either articulated by the Commission or existent in the facts of this case which would justify the racial quotas ordered by the Commission. The record in this matter totally lacks evidence which demonstrates that there has been an actionable constitution or federal law violation in employment: there was no showing of identifiable victims; there was no evidence of intentional discrimination; the definition of "discriminatory employment practices" (the cornerstone of Rule 7.10) does not require that the relevant conduct have an adverse impact on minorities; and the facts[13] which were the basis

[13]The facts which supported the finding of discrimination were: 1. "traditional" civil service system; 2. "unvalidated" oral examinations; 3. lack of recruitment; and 4. lack of appointment of minority attorneys (one) from the Student Intern Program.

for the Findings of unintentional discrimination are astonishingly weak. Finally, the record shows no long-standing, established discrimination because, in fact, no *actual* discrimination was proven. Certainly the record is bare of any demonstration of a state interest which is even arguably compelling.

Additionally, the record fails to show that a racial quota is a *necessary means* to accomplish the elimination of the effects of the alleged discrimination. If the real purpose for the Rule was to correct the effects of past discrimination, the definition of "'discriminatory employment practice" would have required the practices to have an adverse impact on minorities. If the Rule and Order were really concerned with discrimination (rather than proportionality) they would have contained some provisions *to correct* the evils which the Commission believed caused discrimination. However, no efforts were or have been made by the Commission to modify those facts (set forth in Footnote 13) which were found to cause the alleged discrimination.

Assuming, for the sake of argument, that actual discrimination did exist, a racial quota is not a rational or necessary method of curing that discrimination. *Bakke*, supra. As Justice Mosk stated in his Dissenting Opinion below in this matter, " . . . for every person quota-ed in, another is quota-ed out. There is no way in which a numerical quota can be benign. If it favors one, it necessarily rejects another."[14]

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[14]Justice Mosk, in his Dissent, discusses (Appendix A-56 through A-58) some of the inherent evils of quotas. Among them are: the impossible problem of fairly defining what a minority is; and what

Aside from the discrimination which the Commission has ordered, the procedures set forth in the Rule and which the Commission followed do not meet basic Due Process requirements of the United States Constitution. The right to engage in gainful public employment is a protected personal liberty. *Hampton v. Mow Sun Wong* (1976) 426 U.S. 88. The Rule does provide for public hearings, but contains no procedural safeguards to assure that they would be held in a meaningful manner (and indeed they were not). There was no requirement for sworn testimony, for the examination of witnesses, for the application of basic rules of evidence, for the recordation of the hearings, or for review or appeal. It is astonishing that a non-elected group of five persons with no special qualifications, based solely upon unsworn statements and rumor, without the appearance or identification of particular victims, and without recordation, can then order a racial quota in public employment. Certainly the basic requirements of constitutional due process have not been met.

Petitioner's position is well summarized in a quote from Justice Douglas' dissent in *DeFunis v. Odegaard* (1974) 416 U.S. 312, 342:

> The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.

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percentage of blood is required to qualify a person as a member of today's "chosen people."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERB JACKSON
District Attorney of Sacramento County
L. ANTHONY WHITE
Chief Deputy District Attorney
DAN M. KINTER
Supervising Deputy District Attorney
Attorneys for Petitioner

(Appendices follow)

Appendices

Appendix A

In the Supreme Court
of the
State of California

S.F. 23836
Super. Ct. No. 257623

John M. Price, as District Attorney, etc.,
Plaintiff and Respondent,

vs.

Civil Service Commission of Sacramento County et al.,
Defendants and Appellants.

[Filed Jan. 25, 1980]

OPINION

In this case we must determine whether a governmental entity may voluntarily adopt a race-conscious, affirmative action hiring program of limited duration to alleviate an underrepresentation of minority employees which the entity finds is attributable to its own past discriminatory employment practices.

The trial court in this action enjoined the County of Sacramento from implementing such a remedial hiring program, concluding that any measure that attempts to increase the proportion of minority workers through the

SEE DISSENTING OPINION

employment of hiring ratios or goals violates the constitutional rights of non-minorities, even when the program is adopted as a remedy for past discrimination. The District Attorney of Sacramento County, who initiated the present litigation, maintains that such a race-conscious hiring plan is not only unconstitutional, as the trial court held, but in addition violates various provisions of Title VII of the federal Civil Rights Act, the California Fair Employment Practice Act (FEPA) and the Sacramento County Charter.

As we shall explain, in light of the United States Supreme Court's recent decisions in United Steelworkers, etc. v. Weber (1979 ..... U.S. ..... [99 S.Ct. 2721] and University of California Regents v. Bakke (1978) 438 U.S. 265, we have concluded that the trial court judgment must be reversed. The *Weber* and *Bakke* decisions teach that neither the pertinent antidiscrimination enactments nor the constitutional equal protection guarantee may properly be interpreted to prohibit a governmental employer from voluntarily implementing a reasonable race-conscious hiring program to remedy the effects of the employer's own past discriminatory employment practices. Such remedial affirmative action measures promote, rather than thwart, the attainment of the ultimate constitutional and legislative objective: a society in which equal employment opportunity is a reality rather than an elusive dream.

1. *The facts and proceedings below.*

In 1974, the Sacramento County Civil Service Commission (Commission), concerned with the relative paucity of

minority individuals in the county's employ, conducted a series of hearings into the county's past hiring practices in an attempt to ascertain the reasons for the under-representation and to identify potential courses of action to ameliorate the situation.

Testimony and other evidence presented at these hearings revealed that Sacramento County's traditional civil service selection procedures, like similar civil service systems throughout the country, embodied a variety of significant, although apparently inadvertent, discriminatory features. Employment experts explained initially that such civil service systems have traditionally relied heavily either on ostensibly objective written examinations or on avowedly subjective oral examinations (i.e., interviews), both of which have operated to screen out a disproportionate number of minority applicants. Although such examinations were generally employed by governmental employers in the expectation that such procedures would ensure a "merit" selection process, the experts testified that upon analysis the procedures actually utilized could not be so justified. Written civil service examinations very often were severely outdated and bore no relationship to the employment position for which application was being made, and oral examinations were in general neither structured to assure uniformity and fairness in application nor scrutinized to determine that the results of the interview procedure actually correlated with an applicant's ability to perform the job under consideration.

In addition the experts reported that although civil service positions were theoretically open to all applicants, many public employers in the past undertook few, if any,

steps to disseminate information of openings to the public at large. As a consequence, applicants were frequently confined to friends or relatives of present employees who had learned of the job opportunities by word of mouth. Groups who were not already represented in the workforce, including most minority groups, were thus effectively, albeit unintentionally, excluded from the hiring process.

In response to the information devolped at this series of hearings, the Commission adopted a general regulation, rule 7.10, entitled "minority preference appointment";[1] the

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[1]Rule 7.10 provides in full:

"*MINORITY PREFERENCE APPOINTMENT*

"(a) The purpose of this rule is to provide a procedure for adjustment of disproportionate representation of minority personnel in the County work force which is a result of discriminatory employment practices.

"(b) As used in this rule:

"(1) 'Minority personnel' includes, but is not necessarily limited to, Blacks, Indians, Mexican-Americans, Spanish-Americans, Orientals, other non-Whites and women.

"(2) 'Discriminatory employment practice' means the use by the County of selection methods or selection criteria not related to the job.

"(3) 'Alternating ratio' means a ratio indicating a number of minority persons who shall be appointed to a classification for a given number of non-minority persons appointed to the classification.

"(c) The findings required by this rule shall be made separately in relation to each classification after a public hearing at which interested persons are afforded an opportunity to be heard and to present evidence. The Commission may order minority appointment preference as provided in this rule if it finds that:

"(1) The number of minority personnel in a classification is disproportionately low in relation to the population mix of

validity of the regulation lies at the heart of the instant controversy. The initial subdivision of rule 7.10 declares: "The purpose of this rule is to provide a procedure for adjustment of disproportionate representation of minority personnel in the County work force which is a result of discriminatory employment practices."

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the County of Sacramento, including the populations of all cities:

"(2) The disproportionate representation was caused by discriminatory employment practices; and

"(3) It is feasible to adjust the disproportionate representation by requiring that minority persons on an eligible list be appointed on a preferential basis as provided in this rule.

"(d) If the Commission makes the findings required by this rule, it may order that minority personnel shall be appointed to the classification involved in accordance with an alternating ratio until a specified number of minority persons have been appointed to the classification. The Commission's order shall specify:

"(1) The minority group or groups included in the order:

"(2) The total number of such appointments, which number shall not be greater than necessary to attain a fair approximation of minority representation in the classification consistent with the population mix in the County of Sacramento, including the populations of all cities.

"(3) The alternating ratio to be used, taking into consideration the population mix of the County, the number of minority persons who can be reasonably expected to apply and qualify, and any other relevant circumstances; and

"(4) Any other requirements which the Commission determines are reasonably necessary to assure effective compliance with the order in accordance with the purposes of this rule.

"(e) If the classification is used by more than one department, the order shall also specify the number of minority appointments to be made by each department using the classification. The number for each department may be zero or greater and shall be determined by the Commission for

Under the terms of the rule, if the Commission finds "after a public hearing at which interested persons are afforded an opportunity to be heard and to present evidence" that the underrepresentation of minority personnel in a particular classification was caused by "discriminatory

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each department on the basis of any relevant considerations including, but not limited to, the number of positions in the classification in the department and the extent to which a representative minority mix already exists in said positions.

"(f) An order may be rescinded or revised from time to time by the Commission as it determines to be necessary or appropriate. Such action may be taken by the Commission on its own motion or at the request of any interested person. In determining whether to rescind or revise an order, the Commission may consider any relevant information including but not limited to the needs of the service, changed circumstances, problems encountered in implementing the order, and information which was not previously considered by the Commission.

"(g) The Director of Personnel Management shall certify for appointment minority persons from the eligible list for a classification for which the Commission has ordered use of an alternating ratio ahead of non-minority persons only when necessary to implement the requirements of the order. If a department required to appoint in accordance with an alternating ratio has not yet made the maximum number of non-minority appointments permitted by the applicable alternating ratio, persons shall be certified for appointment to a vacancy in the classification in the order of their standing on the list. If the department has made the maximum number of non-minority appointments permitted by the ratio, names of minority persons only shall be certified in the order of their standing on the list and the appointment shall be made from among the minority persons whose scores at the time of certification represent the three highest ranks and who are available for appointment."

employment practices,"[2] and that it is feasible to ameliorate such underrepresentation "by requiring that minority persons on an eligible list be appointed on a preferential basis as provided in this rule," the Commission may order that minority personnel shall be appointed to the classification involved in accordance with an alternating ratio until a specified number of minority persons have been hired. The rule additionally provides that any such remedial order remains continually subject to modification or rescission, and that "[i]n determining whether to rescind or revise an order, the Commission may consider any relevant information including but not limited to the needs of the service, changed circumstances, problems encountered in implementing the order, and information which was not previously considered by the Commission."

As early as June 1974, the date of the original adoption of rule 7.10, the Commission became aware of, and con-

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[2]On its face, the definition of "discriminatory employment practice" in rule 7.10, subdivision (b)(2) (see fn. 1, *ante*) appears to differ from the traditional definition of that term in federal employment discrimination litigation, since as defined in the rule the term could be read to include non-job-related practices which do not adversely affect minorities. Taken as a whole, however, rule 7.10's provisions make it clear that only "discriminatory employment practices" which actually cause a disproportionate underrepresentation of minority employees will warrant the issuance of a race-conscious remedial order under the rule. Moreover, the Commission's ruling in this case plainly indicates that the Commission has interpreted the "discriminatory employment practice" terminology of the rule as synonymous to the categories of employment practices that have been found to violate Titile VII of the federal Civil Rights Act. (See fn. 17, post.)

Accordingly, we shall use the term "discriminatory employment practice" in this opinion as the equivalent of such terminology in the pertinent federal employment discrimination cases.

cerned about, the almost complete absence of minority attorneys in the county district attorney's office. The Commission did not, however, immediately institute proceedings under the new rule but instead postponed any direct action, relying on the district attorney's assurances that he would undertake additional efforts to recruit and hire minority attorneys. In July and December 1974, the district attorney repeated his assurances to the Commission, but when additional minority attorneys had not been hired by the summer of 1975, the Commission commenced a hearing under rule 7.10 to determine whether a remedial order should be issued.

At the conclusion of the hearing, the Commission found that the specific prerequisites to a remedial order under rule 7.10 were established, and that a remedial order should be issued.[3] The Commission noted initially that only 1 of the 65 attorney positions in the district attorney's office was filled by a minority person and thus that the number of minority personnel was "disproportionately low" in relation to the 19.5 percent minority population in Sacramento County generally.

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[3]The remedial order adopted by the Commission applies only to minorities other than women. The Commission's findings explain the basis of this omission: "In accordance with Commission Resolution No. 74-1 the Commission has heretofore implemented Rule 7.10 only for minorities other than women. Necessary studies and hearings regarding representation of women in county employment and affirmative action needs for employment of women are not yet complete. Accordingly, the order of the Commission herein shall be limited to minorities other than women." No party to the present action has raised any objection to this aspect of the order.

The Commission additionally found that the underrepresentation of minorities resulted from a number of unintentional discriminatory employment practices, including inter alia the use of unvalidated oral examinations and the absence of adequate recruitment efforts. Finally, the Commission found that it would be feasible to adjust the disproportionate representation of minority attorneys in the district attorney's office by implementing the remedial preference authorized by rule 7.10.

In formulating the specifics of the remedial order, the Commission took into account the percentage of available qualified minority attorneys on the county's eligibility list. The Commission's order specified that appointments in the class of Attorney I in the district attorney's office "shall be made on the basis of an alternating ratio of 2:1 so that at least one minority person is appointed for every two non-minority persons" and that "[s]aid ratio shall be applied only until the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%."

The Commission's findings indicated that in light of the fact that the current Sacramento County Attorney I eligibility list contained 12.7 percent minority representation, and that minority attorneys comprised 17 percent of the entry level attorneys in state legal offices, the 8 percent figure was quite realistic and feasible. Indeed, in terms of the numbers of lawyers in the Attorney I and Attorney II classifications at the time of the Commission decision, the remedial order would apparently have become inoperative

as soon as the district attorney's office hired two or three minority attorneys.[4]

Shortly after the Commission issued its order, the district attorney instituted the instant mandamus proceeding against the Commission and the county board of supervisors, challenging the validity of the Commission's order and, inferentially, the validity of rule 7.10 itself insofar as the rule authorized the implementation of such race-conscious remedial orders. After rejecting defendants' preliminary contention that the district attorney lacked authority to maintain the suit,[5] the trial court heard argu-

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[4]There were 34 attorneys in the Attorney I and Attorney II classifications in the district attorney's office at the time the order was issued. The 8 percent goal would be met by the employment of 3 minority attorneys (8 percent of 34 = 2.72). Even if the single minority attorney already employed by the office was promoted to Attorney III, the order would have required only that three of the next nine attorneys hired by the district attorney be qualified minorities.

[5]After the trial court overruled their demurrer on this issue, defendants sought a writ of mandate and/or prohibition from the Court of Appeal. The Court of Appeal issued an alternative writ, but ultimately decided the issue in favor of the district attorney, denying the peremptory writ in a written opinion fully discussing the merits of defendants' contention. (Civil Service Commission v. Superior Court (Feb. 11, 1976) 3 Civ. 15730 [unpub. opn.].) Our court thereafter denied a petition for hearing in the matter.

On the present appeal, defendants seeks to relitigate the issue of the district attorney's authority or "standing" to prosecute the instant action. We agree with the district attorney's contention that under the instant circumstances the "law of the case" doctrine defeats defendants' claim on this point. As noted, the Court of Appeal's earlier ruling on the standing issue was a decision on the merits of the claim through a written opinion; such a decision is generally binding under the law of the case doctrine even though the opinion was rendered in an extraordinary writ proceeding. (See,

ment on the merits of the case, and thereafter concluded that rule 7.10 was unconstitutional on its face. In view of that conclusion, the trial court found it unnecessary to address the district attorney's additional contention that the findings underlying the Commission's order were not supported by the evidence. The court thereafter entered judgment in favor of the district attorney, permanently restraining the defendants from implementing or enforcing rule 7.10. Defendants have appealed from that judgment.

2. *The Commission was authorized to adopt a general remedial affirmative action program to overcome the effects of its past discriminatory employment practices, and the race-conscious hiring ratios authorized under 7.10 do not violate the Sacramento County Charter, the FEPA, Title VII of the federal Civil Rights Act or constitutional equal protection principles.*

Although the trial court rested its decision solely on the asserted unconstitutionality of rule 7.10, on this appeal the district attorney defends the trial court's invalidation of rule 7.10 on a variety of grounds. He contends (1) that the Civil Service Commission lacked authority to implement any affirmative action hiring program, (2) that the "racial ratio" remedial orders authorized by rule 7.10 are prohibited by various provisions of the county charter, the FEPA and Title VII of the federal Civil Rights Act and

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e.g., People v. Medina (1972) 6 Cal.3d 484, 492.) Furthermore, as we noted in Davies v. Krasna (1975) 14 Cal.3d 502, 507, footnote 4: "The [law of the case] rule applies even though the subsequent appeal comes before this court whereas the prior [proceeding was] before [the Court] of Appeal."

(3) that the county's implementation of such "racial ratio" measures violates the state and federal equal protection clauses. In light of the traditional judicial inclination to avoid a constitutional ruling if a case can be resolved on nonconstitutional grounds (see, e.g., Ashwander v. T.V.A. (1936) 297 U.S. 288, 346-348 (Brandeis, J., concurring)), we turn initially to the district attorney's charter and statutory arguments.

(a) *The Commission was authorized to adopt an affirmative action hiring program to overcome the effects of past discrimination.*

The district attorney argues first that under the provisions of the Sacramento County Charter, the Commission enjoys no authority to implement any form of minority affirmative action program which provides for departure from strict civil service eligibility rankings in the hiring of county employees. Although the district attorney recognizes that the charter specifically designates the Commission as the appropriate governmental body to "establish rules regarding the selection of employees for, and the classification of, civil service positions" (Sac. County Charter, art. XVI, § 71-B, subd. (a)), he contends that the Commission's authority in this regard is strictly limited by the specific charter provisions which establish the general procedures for the filling of civil service positions through competitive examinations. (See, *id.*, § 71-F, subds. (a)-(c).)[6]

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[6]Section 71-F, subdivisions (a) through (c) provide:

"(a) The county civil service is career service and all appointments to positions in the civil service shall be based on

Although section 71-F, subdivisions (a) through (c) of the charter do prescribe a general procedure for hiring employees on the basis of rankings on competitive examinations, the district attorney's argument ignores additional charter provisions which specifically proscribe discriminatory employment practices and which authorize the Commission to enforce the antidiscrimination provisions by appropriate regulation or order. (See *id.*, §§ 61; 71-F, subd. (f); 71-B, subds. (d), (g).)[7] Inasmuch as the Commission

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relative fitness as ascertained by competitive examinations. At least ten days' notice shall be given of each examination.

"(b) Eligible lists shall be established upon which shall be entered the names of successful candidates in the order of their standing in examination.

"(c) Eligible lists shall be established upon which shall be entered the names of successful candidates in the order of their ranking in the examination. For the filling of one vacancy, the appointment shall be made from among the eligibles whose scores, at the time of certification, represent the three highest ranks on the list. For purposes of ranking, scores of eligibles on an eligible list shall be rounded to the next highest whole percent and a rank shall consist of one or more eligibles with the same whole percentage score. If a special skill is needed for some, but not all positions, in a class, which special skill has been tested for on a pass or fail basis as a part of the examination on which the list is based and the vacancy is one of the positions in the class requiring the special skill, the appointment may be made from the eligibles possessing the special skill who are available for appointment and whose scores at the time of certification represent the three highest ranks on the list of those who possess the special skill."

[7]Section 61 provides:

"No person in the classified or unclassified service, or seeking admission thereto shall be appointed, reduced, removed, or in any way favored or discriminated against because of his race, color, creed, sex, national origin or political affiliation. The provisions of this section are not intended to prevent the establishment of special limited programs for the employment

after a duly authorized investigation (*id.*, § 71-B, subd. (e)) determined that it had grounds to suspect that the county's past competitive examinations had had a racially discriminatory effect and that such examinations were not job-related, we have no doubt that the Commission's enforcement authority empowered it to take action to remedy the situation. Under these circumstances, the promulgation of an affirmative action plan, directed specifically at ameliorating minority underrepresentation which is found to have resulted from the county's own discriminatory employment practices, falls within the authority of the Commission. (Cf. Associated Gen. Contractors of Mass., Inc. v. Altschuler (1st Cir. 1973) 490 F.2d 9, 20-21, cert. den. (1974) 416 U.S.

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of economically, socially, physically or mentally deprived persons."

Section 71-F, subdivision (f) provides:

"(f) No person in county service, or seeking admission thereto, shall be appointed, reduced, removed, or in any way favored or discriminated against because of his race, color, creed, sex, national origin or political affiliation. This provision is not intended to prevent the establishment of special programs for the employment of economically, socially, physically or mentally deprived persons."

Section 71-B, subdivisions (d) and (g) provide:

"(d) The commission shall make final decisions on appeals involving alleged improper action under, or the denial of any rights provided by, this article or the rules adopted thereunder. The commission's authority in this regard pertains only to examinations and other matters under the jurisdiction of the commission pursuant to this article."

"(g) The commission may adopt rules to carry out the commission's powers and duties and governing the commission's proceedings under this article."

957; Lindsay v. City of Seattle (1976) 86 Wn.2d 698 [548 P.2d 320, 327] cert. den., 429 U.S. 886.)[8]

We find no merit in the district attorney's additional argument that the Commission was "preempted" from adopting its remedial affirmative action by the provisions of the California FEPA. (Lab. Code, § 1410 et seq.) The FEPA does create a statewide remedy for victims of discriminatory employment practices, but nothing in the act evidences any intent to preclude employers—public or private—from voluntarily implementing affirmative action plans to overcome the continuing effects of past discrimination. On the contrary, specific provisions of the FEPA declare that state policy strongly favors the adoption of such voluntary affirmative action plans. (See Lab.

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[8]An additional charter provision authorizes the Commission to formulate affirmative action plans to aid disadvantaged minorities even in the absence of specific findings of past discrimination. Section 71-F, subdivision (i), a section which follows charter provisions sanctioning the granting of preferences to military veterans and to permanent county employees (§ 71-F, subds. (g) & (h)), authorizes the Commission to "provide for the establishment of programs, including trainee programs, designed to attract and utilize persons with minimal qualifications, but with potential for development, in order to provide career development opportunities *among members of disadvantaged groups,* handicapped persons and returning veterans. *Such programs may provide for permanent appointment upon the satisfactory completion of the training period without further examination.*" (Emphasis added.)

It does not appear, however, that rule 7.10 was promulgated pursuant to this authority, for the rule limits its remedial orders to instances in which underrepresentation was caused by past discrimination and does not completely bypass the competitive examination procedure but simply authorizes the hiring department to reach otherwise nonappointable minorities on an existing eligibility list. (See rule 7.10, subd. (g) (quoted at fn. 1, *ante*).)

Code, § 1431; see also Gov. Code, § 19790 et seq.) Moreover, a recent amendment to Labor Code section 1432, subdivision (c) explicitly provides that nothing in the FEPA is intended to foreclose local governmental entities from going beyond the FEPA and enacting additional measures "banning discrimination in employment by any city, city and county, county, or other political subdivision of the state." (Stats. 1978, ch. 1254, § 19, p. .)

Thus, we conclude that the Commission was empowered to adopt a remedial affirmative action program to ameliorate the effects of the county's past discriminatory employment practices.[9]

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[9]Because the county charter invests the Commission with authority over the procedures for selection of civil service employees, it is clear that, contrary to the dissent's assertions (see *post*, p.),[*]: the affirmative action plan at issue was *voluntarily* adopted by the County of Sacramento, since the plan was implemented by the Commission without any compulsion by federal or state authorities. The fact that a head of one of the constituent departments of the county-employer, i.e., the District Attorney, disagreed with the adoption of such a plan does not, of course, render the plan "involuntary" any more than the disagreement of one of a private employer's foremen or department heads would render a plan adopted by the responsible official of such an employer involuntary.

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[*]Multilith opinion, pages 1-2.

(b) *The remedial race-conscious orders authorized by rule 7.10 do not violate the antidiscrimination provisions of Title VII of the federal Civil Rights Act or the comparable antidiscrimination strictures of the Sacramento County Charter and the FEPA.*

This issue brings us to the district attorney's principal contention. The district attorney argues that even if the Commission is empowered to adopt some form of affirmative action plan, the "racial hiring ratio" program authorized by rule 7.10 is not a permissible remedial procedure. The district attorney asserts that any remedial measure that reserves a designated percentage of employment opportunities for qualified minority persons impermissibly discriminates against nonminority applicants for county employment on the basis of their race. As such, he maintains that it violates the antidiscrimination provisions of the Sacramento County Charter, of the FEPA, and of Title VII of the federal Civil Rights Act. Although the wording of these disparate provisions varies in some respects, each of the sections provides in essence that no person shall be discriminated against in employment opportunities on the basis of his race, color, creed, sex or national origin.[10] The district attorney argues that, liter-

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[10]The relevant provisions of the Sacramento County Charter, sections 61 and 71-F, subdivision (f), are set forth in full at footnote 7, *ante.*

The relevant provision of the FEPA provides as follows: Section 1420: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based

ally applied, the terms of these antidiscrimination provisions bar *all* racial hiring ratios—regardless of their remedial nature—since such racial ratio measures operate to exclude nonminorities, on the basis of their race, from the percentage of positions reserved for qualified minority applicants.

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upon applicable security regulations established by the United States or the State of California:

> "(a) For an employer, because of the race, religious creed, color, national origin, ancestry, or sex of any person, to refuse to hire or employ him or to refuse to select him for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

The relevant provisions of Title VII of the federal Civil Rights Act of 1964 provide as follows: Section 703(a) (42 U.S.C. § 2000e-2(a)): "(a) It shall be an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 703(d) (42 U.S.C. § 2000e-2(d)):

> "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

The United States Supreme Court recently addressed this issue in United Steelworkers, etc. v. Weber, *supra*, ... U.S. ..... [99 S. Ct. 2721]. In *Weber*, an employer, Kaiser Aluminum & Chemical Corporation, seeking "to eliminate conspicuous racial imbalances in [its] . . . almost exclusively white craft forces" (*id.*, at p. 2725), implemented an affirmative action plan which established an in-plant craft training program for its employees. The plan provided that selection of applicants for the training program would be made on the basis of seniority, but additionally provided that at least 50 percent of the new trainees were to be black until the percentage of black skilled craft workers in the plant approximated the percentage of blacks in the local labor force. A nonminority employee who had been rejected for the training program even though he had greater seniority than some of the black employees who had been admitted to the program challenged the validity of the plan under Title VII, contending, as the district attorney does in this case, that the "racial ratio" aspect of the plan—reserving 50 percent of the training positions for minorities on a temporary basis —discriminated against him on the basis of his race in violation of the statute.

In *Weber*, Justice Brennan, writing for the majority of the court in a five-to-two decision,[11] rejected the employee's contentions and upheld the validity of the employer's race-conscious affirmative action program. Although the

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[11]Justices White, Stewart, Marshall and Blackmun joined Justice Brennan's opinion in *Weber*. Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens did not participate in the decision.

court acknowledged that a literal construction of the anti-discrimination sections of Title VII might preclude all such race-conscious remedial programs, the majority concluded that it would be inappropriate to adopt such a construction, explaining "[i]t is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' [Citations.]" (*Id.*, at p. 2727.) Upon examination of the legislative history of the Civil Rights Act and a review of the historical context from which the act arose, the court concluded "that an interpretation of the sections that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected. [Citations.]" (*Id.*)

The *Weber* court noted, in this regard, that one of the principal goals of the entire Civil Rights Act of 1964 was "the integration of blacks into the mainstream of American society" (*id.*) and that Title VII's prohibition of racial discrimination in employment was directed towards "open-[ing] employment opportunities for Negroes in occupations which have been traditionally closed to them." (*Id.*, at p. 2728.) Given these circumstances, the court observed that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' [citation] constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." (*Id.*) Accordingly, the *Weber* court held that Title VII's prohibition against

racial discrimination does not mandate a "colorblind" approach to all employment remedies and does not compel an employer to eschew race-conscious affirmative action programs under all circumstances.[12]

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[12]A majority of the Supreme Court reached a similar conclusion in construing the provisions of Title VI of the federal Civil Rights Act in *Bakke*, determining that the antidiscrimination provision of Title VI does not prescribe a totally colorblind regime, but rather permits persons covered by the section to adopt race-conscious programs which, if adopted by a governmental entity, would comport with equal protection principles. (See 438 U.S. 265, 284-287 (opn. of Powell, J.); *id.*, at pp. 328-355 (opn. of Brennan, White, Marshall and Blackmun, JJ.)

In *Bakke*, Justice Stewart joined Justice Stevens' opinion which apparently would have construed Title VI to prohibit any "racial ratio" affirmative action program, at least in the absence of a showing of past discrimination. In the more recent *Weber* case, however, Justice Stewart joined Justice Brennan's opinion which eschewed such an interpretation of an analogous antidiscrimination provision, and thus it appears that at least six justices of the Supreme Court now agree that such antidiscrimination provisions should not normally be construed to bar all race-conscious remedies.

In contending that the Commission's race-conscious hiring practice violates Title VII, the district attorney relies on a passage from Justice Stevens' opinion in Los Angeles Dept. of Water & Power v. Manhart (1978) 435 U.S. 702, 709, which states, inter alia, that "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." The *Manhart* decision clearly does not control here, however, for that decision did not pass upon a remedial affirmative action program at all, but instead involved a traditional sex discrimination challenge to an employment practice which operated to disadvantage women. Similarly, in McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, relied on by the dissent, Justice Marshall carefully explained that the employer "disclaims that the actions challenged here were any part of an affirmative action program . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." (*Id.* at p. 281, fn. 8.) The United States Supreme Court's subse-

The *Weber* decision, while refuting the district attorney's broad contention that Title VII bans all race-conscious employment procedures, stops short of holding that Title VII's antidiscrimination provisions place no restrictions whatsoever on an employer's use of race-conscious measures in affirmative action plans. It suggests that an extreme or inflexible race-conscious program might not be permissible. Although the *Weber* court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans" (*id.*, at p. 2730), the court did squarely hold that the affirmative action plan at issue in

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quent decisions in *Bakke* and *Weber*, interpreting the antidiscrimination language of Title VI and Title VII in an affirmative action context, are unquestionably more directly in point than *Manhart* or *McDonald*.

Furthermore, the suggestion that Title VII imposes different standards on public employers than on private employers clearly lacks merit. Contrary to the dissent's assertion, nothing in the McDonald decision—which involved a private employer—supports such an argument, and in Dothard v. Rawlinson (1977) 433 U.S. 321, 331, fn. 14, the Supreme Court explicitly recognized that the legislative history of the 1972 amendments extending Title VII to public employers evidenced an intent that 'the same Title VII principles be applied to governmental and private employers alike." Moreover, every circuit court that has passed on the issue has concluded that "whether the employer be private or public, the same prerequisites to Title VII liability apply." (See, e.g., Scott v. City of Anniston (5th Cir. 1979) 597 F.2d 897, 899-900; Blake v. City of Los Angeles (9th Cir. 1979) 595 F.2d 1367, 1372-1374; United States v. City of Chicago (7th Cir. 1978) 573 F.2d 416, 420-424; Firefighters Institute, etc. v. City of St. Louis (8th Cir. 1977) 549 F.2d 506, 510, cert. den. (1977) 434 U.S. 819. See also Detroit Police Officers Assn. v. Young (6th Cir. 1979) .. F.2d ...)* See generally Powers, *Implications of Weber—A Net Beneath*" (1979) 5 Employee Relations L.J. 325, 333-334.

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*48 U.S.L. Week 2277.

Weber "falls on the permissible side of the line" (*id.*) and its explanation of this conclusion provides at least some rough guidance as to the nature of the factors to be considered in determining the validity of a race-conscious affirmative action plan under Title VII.

In sustaining the *Weber* plan, the court stated: "The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.' [Citation.] [Par.] At the same time the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. *Cf. McDonald v. Santa Fe Trail Trans. Co.*, [(1976) 427 U.S. 273]. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force. [Citation.]" (Fn. omitted.) (*Id.*, at p. 2730.) Under these circumstances the court held that the plan did not violate Title VII.

This passage from *Weber* suggests that the propriety of a race-conscious plan under Title VII will depend first, upon whether the overall purposes of the plan are compatible with the broad objectives of Title VII and, second,

whether or not the plan operates in an unduly harsh manner on non-minorities, i.e., whether the specific remedial plan "unnecessarily trammel[s] the interests of the white employees." (*Id.*)

When measured against the application of these criteria in *Weber,* the race-conscious program prescribed by rule 7.10 does not violate Title VII. First, the purpose underlying rule 7.10 clearly accords with the objectives of Title VII. The rule, like the *Weber* plan, seeks to eliminate established patterns of racial segregation and hierarchy and to open employment opportunities from which minorities have been disproportionately excluded. Indeed, rule 7.10 perhaps more clearly resembles the purposes of Title VII than the *Weber* plan, since the declared purpose of rule 7.10 "is to provide a procedure for adjustment of disproportionate representation of minority personnel . . . *which is a result of discriminatory employment practices*" (emphasis added) whereas the *Weber* plan prescribed remedial measures in the *absence* of proof of any specific employment discrimination.

Second, the race-conscious remedy authorized by rule 7.10 operates no more harshly on the rights of non-minorities than the plan approved in *Weber.* Like the *Weber* program, rule 7.10 does not contemplate the discharge of nonminority workers and their replacement with minority employees. Similarly, the "alternating ratio" procedure prescribed by rule 7.10 creates no absolute bar to the hiring of nonminority personnel; under the order at issue here, for example, up to two-thirds of newly hired attorneys may be nonminorities. Finally, rule 7.10, like the *Weber* plan,

makes plain that its remedial orders are temporary in nature, intended simply to eliminate the results of past discrimination and not indefinitely to maintain a prescribed racial balance. Thus, the order under attack here specifies that the minority ratio shall be applied "only until the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%."

Accordingly, under *Weber,* the race-conscious remedial plan established in rule 7.10 clearly does not violate the antidiscrimination provisions of Title VII.

Although the United States Supreme Court's interpretation of the antidiscrimination provisions of Title VII does not, of course, necessarily determine the appropriate interpretation of the antidiscrimination provisions of the Sacramento County Charter or the FEPA, we believe that those provisions should similarly not be interpreted to bar all such race-conscious affirmative action plans. First, the relevant provisions of both the county charter and the FEPA arose out of the same historical context as the federal Civil Rights Act and were intended to achieve the same general objectives as the antidiscrimination prohibitions contained in the federal law. Second, additional features in both the county charter provisions and the FEPA demonstrate that their general ban on employment discrimination did not propose to inhibit the promulgation of effective affirmative action programs. Thus, both of the relevant charter provisions—after enumerating the broad prohibition on employment discrimination—go on to state that "[t]he provisions of the section are not intended to prevent the establishment of special limited programs for the employment of economically, socially, physically or

mentally deprived persons." (See Sac. County Charter, art. XIV, § 61; art. XVI, § 71-F, subd. (f) (quoted at fn. 7, *ante*).) Similarly, a recent legislative amendment of the FEPA specifically cautions that the statutory provision "shall not be interpreted in such a manner as to adversely effect otherwise lawful state or federal programs which benefit the physically handicapped, the aged, low-income individuals, *minorities*, or women." (Emphasis added.) (Stats. 1978, ch. 1254, § 20, p. .)

Moreover, in recent years the California Legislature has enacted a number of additional statutory provisions, relating to the state's own employment practices, that demonstrate a legislative determination that race-conscious affirmative action employment programs which employ specific goals and timetables fully accord with general antidiscrimination principles. Government Code, section 19702, like the earlier-quoted provisions of the Sacramento County Charter and the FEPC, provides broadly that with respect to state civil service employment "[a] person shall not be discriminated against . . . because of sex, race, religious creed, color, national origin [or] ancestry . . . ." In 1977, the Legislature added a new chapter to the Government Code, sections 19790 through 19797, entitled "State Civil Service Affirmative Action Program." (Stats. 1977, ch. 943, § 2, p. 2876.) The initial provision of the chapter, section 19790, provides in part: "Each agency and department is responsible for establishing an affirmative action program. . . . *Each agency and department shall establish goals and timetables designed to overcome any identified underutilization of minorities and women in their respective organizations.*" (Italics added.)

The new chapter goes on to define the terms "goals," "timetables," and "underutilization." It makes clear that the legislation contemplates that state agencies will develop specific hiring and promotional goals to alleviate situations in which an occupation or departmental level has fewer minorities or women "than would reasonably be expected by their availability."[13] These recently enacted provisions clearly refute the contention of the district attorney and several amici that affirmative action plans which employ concrete goals or ratios conflict with the legislatively expressed public policy of the State of California.

Accordingly, we conclude that the race-conscious remedy provided by rule 7.10 does not violate the prohibition on racial discrimination contained in the Sacramento County Charter, the FEPAor Title VII.

(c) *The race-conscious remedial orders authorized by rule 7.10 do not violate either the federal or state equal protection clauses.*

The district attorney argues that even if the recent *Weber* decision establishes that Title VII does not prohibit this kind of race-conscious affirmative action plan, and

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[13]Section 19791 provides in full: "As used in this chapter: (a) 'Goal' means a projected level of achievement resulting from an analysis by the employer of its deficiencies in utilizing minorities and women and what reasonable remedy is available to correct such underutilization. Goals shall be specific by the smallest reasonable hiring unit, and shall be established separately for minorities and women. (b) 'Timetable' means an estimate of the time required to meet specific goals. (c) 'Underutilization' means having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability."

even if the provisions of the county charter and the FEPA similarly do not bar such a measure, rule 7.10 is nonetheless invalid under the equal protection clauses of the state and federal Constitutions. As the district attorney points out, the United States Supreme Court had no occasion to address the equal protection question in *Weber* because the affirmative action plan under attack in that case was voluntarily adopted by a private employer and the limitations which the Fourteenth Amendment place on state action were thus not at issue. (See 99 S.Ct. at p. 2726.)

Although *Weber* is not directly instructive on the constitutional issue, in University of California Regents v Bakke, *supra,* 438 U.S. 265, decided in the term immediately preceding the *Weber* decision, five justices of the Supreme Court did confront the constitutional questions raised by a governmental entity's adoption of a race-conscious affirmative action plan. As we shall explain, an analysis of the various opinions in *Bakke* demonstrates that the remedial plan at issue in the present case is not unconstitutional.[14]

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[14]In suggesting that the court has disregarded stare decisis by failing to follow this court's initial decision in *Bakke* (see *post,* p.),* the dissent ignores the fact that this court's decision in *Bakke* was superseded by the United States Supreme Court decision in that case. Inasmuch as our initial *Bakke* decision relied solely on federal constitutional grounds, the subsequent federal high court decision addressing the issue of federal law is the pertinent governing precedent.

Moreover, the dissent's invocation of this court's decision in *Bakke* is particularly inappropriate, since that decision expressly acknowledged the numerous federal cases upholding the validity of governmentally imposed race-conscious remedial measures in

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*Multilith opinion, page 8.

The *Bakke* case arose out of a challenge to a "special admissions" program established by the UC Davis Medical School which reserved 16 of the 100 places in an entering medical school class for qualified disadvantaged minority students. A nonminority applicant who had been rejected by the medical school attacked the race-conscious special admission program as violative of both the general anti-discrimination provisions of Title VI of the federal Civil Rights Act and the Fourteenth Amendment of the United States Constitution.

In the United States Supreme Court, four justices—Justice Stevens, Chief Justice Burger, Justice Stewart and Justice Rehnquist—found it unnecessary to reach the constitutional issue because they concluded that, without regard to constitutional demands, Title VI should be interpreted to bar the medical school from adopting the race-conscious affirmative action program at issue in that case. The remaining five justices—Justices Powell, Brennan, White, Marshall and Blackmun—however, rejected the notion that, in the context of affirmative action plans, Title VI erected barriers to race-conscious programs that were more restrictive than those imposed by the equal protection clause. These five justices concluded instead that

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the employment discrimination field, and distinguished the affirmative action plan in *Bakke* from the measures approved in the federal cases on the grounds that the record in *Bakke* contained no evidence that the special admissions program was implemented to overcome past discriminatory practices of the UC Davis Medical School. (See Bakke v. Regents of University of California (1976) 18 Cal.3d 34, 57-60.) The affirmative action plan at issue here, tying its race-conscious remedy to the amelioration of specific instances of past discrimination, is directly analogous to the federal employment decisions seemingly approved by this court's *Bakke* decision. (See *id.* at p. 57.)

"Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a state or its agencies . . . ." (438 U.S. at p. 328 (opn. of Brennan, White, Marshall and Blackmun; *id.*, at p. 287 (opn. of Powell, J.).) In light of this conclusion, of course, these justices found it necessary to address and resolve the equal protection issue.

The justices who spoke to the equal protection issue in *Bakke* expressed their views through two separate opinions. Four justices—Justice Brennan, White, Marshall and Blackmun—joined in an opinion authored by Justice Brennan. Justice Powell wrote a separate opinion signed by no other justice.

Although, as discussed below, Justice Powell's constitutional views differed from his four colleagues' views in a number of significant respects, all five justices agreed that the Fourteenth Amendment does not invariably preclude a governmental entity from utilizing racial classifications in all circumstances. (*Id.*, at pp. 305-306 (opn. of Powell, J.); *id.*, at pp. 355-356 (opn. of Brennan, White, Marshall and Blackmun, JJ.).) Indeed a host of prior Supreme Court cases had firmly established not only that the Constitution does not absolutely forbid the use of remedial racial classifications (see, e.g., McDaniel v. Barresi (1971) 402 U.S. 39) but also that, in some circumstances, the Constitution actually compels the use of such classifications if such measures are needed to overcome the effects of prior discrimination. (See, e.g., Board of Education v. Swann (1971) 402 U.S. 43, 46.) Thus, *Bakke* initially makes clear that, like Title VII, the Fourteenth Amendment does not absolutely bar a public employer from

implementing a race-conscious affirmative action program in all circumstances.

Although the five justices agreed that a governmental entity's use of race-conscious measures could be justified in some situations, Justice Powell departed from the four other justices on the question of the nature of the state interest that would support the adoption of such race-conscious remedial measures. In *Bakke,* the record contained no evidence that the underrepresentation of minority medical students which the special admission program was intended to alleviate had resulted from the medical school's use of discriminatory admission criteria, and the medical school defended its special admission program in part on the grounds that the measure was aimed at ameliorating the effects of general "societal discrimination" against minorities. Justices Brennan, White, Marshall and Blackmun concluded that the medical school's objective of remedying the effects of general societal discrimination was sufficiently important to justify the adoption of a reasonably designed race-conscious affirmative action program. (*Id.*, at pp. 362-369.) Justice Powell disagreed on this point, concluding that a desire to remedy the effects of societal discrimination was an insufficiently focused interest to sustain such a program. (*Id.*, at pp. 307-310.)[15]

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[15]Justice Powell also concluded, however, that the medical school's interest in obtaining a diverse student body was a sufficiently compelling interest to justify a race-conscious admissions program (438 U.S. at pp. 311-315) and he thus joined with Justices Brennan, White, Marshall and Blackmun in overturning the portion of the trial court judgment which totally barred the medical school from considering race in the admissions process. (*Id.*, at p. 320.)

At the same time, because Justice Powell found that the medical school had not demonstrated that its numerical racial ratio program

In rejecting the amelioration of societal discrimination as a justification for the use of racial classifications, however, Justice Powell specifically contrasted such a generalized, assertedly "amorphous," objective with the state's interest "in ameliorating, or eliminating where feasible, the disabling effects of *identified* discrimination." (Emphasis added.) (*Id.*, at p. 307.) Justice Powell stated in this regard: "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals *in the absence of judicial, legislative or administrative findings of constitutional or statutory violation.* [Citation.] After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively or administratively defined. Also, the remedial actions usually remain subject to continuing oversight to assure that it will work the least harm feasible to other innocent persons competing for the benefit." (Emphasis added.) (*Id.*, at pp. 307-308.)

As this and other passages of Justice Powell's opinion make clear,[16] although Justice Powell believes that the

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actually furthered the school's interest in obtaining a diverse student body, he joined with Justices Stevens, Stewart, Rehnquist and Chief Justice Burger in invalidating the specific special admissions program at issue in that case. (*Id.*, at pp. 315-320.)

[16]See, e.g., *id.*, at pages 301-302 and footnote 41 (discussing Title VII racial remedy cases and stating "But we have never approved preferential classifications in the absence of proved constitutional or statutory violations"); *id.*, at pages 308-309, footnote 44 ("Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.").

Fourteenth Amendment does not permit a governmental entity to invoke race-conscious remedies which burden nonminorities simply out of a desire to rectify "societal discrimination," he is of the view that a governmental entity is constitutionally authorized to fashion such race-conscious remedies to ameliorate the effects of judicially, legislatively or administratively identified instances of racial discrimination.[17]

It is apparent, of course, that the *Bakke* decision does not answer all questions as to the compatibility of affirmative action plans and the equal protection clause. As indicated above, only five justices addressed the constitutional issue in *Bakke*; the remaining four justices did not express any views on the constitutional question. Prior opinions of the four remaining justices do suggest that a number of those justices concur with Justices Brennan, White, Marshall and Blackmun in the view that specific findings of past discrimination are not a constitutional prerequisite to

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[17]Contrary to the district attorney's contention, Justice Powell's opinion does not suggest that specific racial "ratios," "goals," or "quotas" are impermissible remedies to ameliorate identified violations of statutory or constitutional prohibitions on employment discrimination. Rather, Justice Powell's opinion states in this regard: "The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. [Citations.] Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. [Citations.] But we have never approved preferential classifications in the absence of proved constitutional or statutory violations." (*Id.*, at pp. 301-302. See also cases cited at fn. 19, *post*)

a public employer's adoption of a race-conscious remedial program;[18] these justices would apparently conclude that, from a constitutional perspective, a public employer, like the private employer in *Weber*, may voluntarily adopt such an affirmative action program to alleviate a serious underrepresentation of minorities in its workforce. We recognize, of course, that it is somewhat hazardous to speculate on the court's ultimate resolution of such issues.

Although uncertainties remain in some areas, the opinions in *Bakke* do attest that the race-conscious remedy authorized by rule 7.10 does not violate the Fourteenth Amendment. The rule before us authorizes race-conscious remedies only under circumstances in which Justice Powell, and, a fortiorari, Justices Brennan, White, Marshall and Blackmun (see 328 U.S. at p. 366, fn. 41), have clearly indicated that remedial racial classifications are justified. As we have seen, rule 7.10 provides for the imposition of a racial remedy only after an authorized administrative body, the Civil Service Commission, specifically finds that a disproportionately low percentage of minority employees in a particular department "was caused by discriminatory employment practices"; the race-conscious "alternating ratio" orders sanctioned by the rule are specifically intended to ameliorate the effects of such identified discrimi-

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[18]See, for example, United Jewish Organizations v. Carey (1977) 430 U.S. 144, 162 (opn. of White, J., joined, inter alia, by Stevens, J.); *id.*, at p. 165 (opn. of White, J., joined, inter alia, by Stevens and Rehnquist, JJ.), *id.* at p. 179-180 (opn. of Stewart, J.).

nation.[19] Moreover, as suggested in Justice Powell's opinion, rule 7.10 specifically provides that all orders issued under the rule "remain subject to continuing oversight" (see rule 7.10, subd. (f)) so as to enable the Commission to guarantee that the order, in actual operation, will not impose undue burdens on the needs of the service or on the interests of all interested parties.

Consequently, we conclude that rule 7.10 does not violate federal equal protection guarantees in authorizing the im-

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[19]The district attorney, focusing on a portion of rule 7.10 that requires the Commission to determine whether the number of minority personnel in a given job classification "is disproportionately low in relation to the population mix of the County of Sacramento, including the population of all cities" (rule 7.10, subd. (c)(1)), contends that the rule effectively authorizes the use of race-conscious remedies to overcome such "disproportionate representation" without any finding of past discrimination.

The district attorney's reading of the rule, however, ignores the immediately following subdivision, which requires the Commission to find not only the existence of "disproportionate representation" but that "[t]he disproportionate representation *was caused by discriminatory employment practices.*" (Emphasis added.) (Rule 7.10, subd. (c)(2).) Moreover, the Commission has specifically indicated, in the decision under review here, that "[i]n implementing rule 7.10, it is the intent and purpose of the Commission to adjust for the adverse effect on minorities of past discriminatory employment practices on the basis of substantially the same considerations and decisional law as would be applicable in court in a civil rights action seeking injunctive relief in cases in which there is no evidence of intentional discrimination."

Of course, in a given case, an interested party remains free to challenge the Commission's issuance of a remedial order on the grounds that the order is not justified under rule 7.10 because the evidence before the Commission does not justify a finding that the underrepresentation of minorities in a particular classification was in fact caused by discriminatory employment practices. We address such a contention by the district attorney below.

position of remedial race-conscious hiring ratios to overcome the effects of past discriminatory employment practices. We note that each of the federal courts of appeals which has faced this question has reached the same conclusion, sanctioning the application of minority hiring ratios similar to that authorized by rule 7.10 to remedy the effects of administratively or judicially determined discrimination.[20] Although many of these federal decisions preceded the *Bakke* opinion, all of the circuit courts which have reviewed the question since *Bakke* have reiterated the propriety of race-conscious hiring ratios in this context,[21]

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[20]See, for example, Associated Gen. Contractors of Mass., Inc. v. Altshuler (1st Cir. 1973) 490 F.2d 9, 16-19 (upholding requirement of 20 percent minority employment by government contractor); Bridgeport Guard, Inc. v. Members of Bridgeport C.S. Com'n (2d Cir. 1973) 482 F.2d 1333, 1339-1341 (upholding hiring orders requiring 50 percent minority hires until minorities comprise 15 percent of police workforce); Erie Human Relations Com'n v. Tullio (3d Cir. 1974) 493 F.2d 371, 374-375 (upholding 1 to 1 hiring ratio until blacks comprise 5.5 percent of police workforce); Carter v. Gallagher (8th Cir. 1971) 452 F.2d 315, 327-332 (en banc) cert. den. (1972) 406 U.S. 950 (upholding 1 to 2 hiring ratio until 20 minority firefighters have been hired). See generally Schlei v. Grossman, Employment Discrimination Law (1976) pp. 1199-1221 and cases cited at p. 1200, fn. 20.

[21]See Firefighters Institute v. City of St. Louis, Mo. (8th Cir. 1978) 588 F.2d 235, 239-242, cert. den. sub. nom. Banta v. Firefighters Institute (1979) ... U.S. ... [99 S.Ct. 3096]; Morrow v. Dillard (5th Cir. 1978) 580 F.2d 1284, 1292-1294; Fullilove v. Kreps (2d Cir. 1978) 584 F.2d 600, 606-608, cert. granted May 21, 1979, ... U.S. ... [99 S.Ct. 2403] (Docket No. 78-1007). See also United States v. City of Buffalo (W.D. N.Y. 1978) 457 F.Supp. 612, 640; Local Union No. 35 etc. v. City of Hartford (D. Conn. 1978) 462 F.Supp. 1271, 1277-1286. (See generally Schlei & Grossman, Employment Discrimination Law (1979 Supp.) p. 332; *Note, The Supreme Court—1977 Term* (1978) 92 Harv.L.Rev. 57, 148.)

and, during the same week in June 1979 in which it handed down the *Weber* decision, the Supreme Court denied certiorari in one of the post-*Bakke* decisions which approved the application of specific remedial hiring preferences to a governmental employer. (See Banta v. Firefighters Institute (June 25, 1979) ..... U.S. ..... [99 S.Ct. 3096] *denying cert. to* Firefighters Institute v. City of St. Louis, Mo. (8th Cir. 1978) 588 F.2d 235. See also County of Los Angeles v. Davis (1979) ..... U.S. ..... [99 S.Ct. 1379], analyzed in Powers, *Implications of Weber—"A Net Beneath"* (1979) 5 Employee Relations L.J. 325, 334.)

Moreover, in the wake of *Weber*, a number of federal and state decisions have very recently expressly confirmed the validity of voluntary governmental affirmative action employment programs employing concrete race-conscious hiring goals or ratios comparable to the plan at issue in the instant case. (See, e.g., Detroit Police Officers' Assoc. v. Young (6th Cir. 1979) ..... F.2d .....;* Maehren v. City of Seattle (1979) ..... Wn.2d ..... [599 P.2d 1255]. See generally Powers, *Implications of Weber—"A Net Beneath"* (1979) 5 Employee Relations L.J. 325, 333-335.)

Thus, although the United States Supreme Court's recent decision in *Weber* involved a private employer, the *principle* that the eradication of past discrimination against minorities may be corrected by affirmative actions of government entities under the Fourteenth Amendment has been upheld by a majority of the Supreme Court in *Bakke* and by the rulings of all of the federal courts of appeals that have addressed the issue. The principle, moreover, is

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*48 U.S.L. Week 2277.

sustained by the elemental concept that the continuing effects of a past wrong should if possible be remedied by present action.

The district attorney additionally contends that even if the race-conscious remedial measures authorized by rule 7.10 are compatible with the *federal* equal protection guarantee, our court should find such measures barred under *state* equal protection principles. Although the state equal protection guarantee embodied in article I, section 7, subdivision (a) of the California Constitution does provide safeguards separate and distinct from those afforded by the Fourteenth Amendment (see Cal. Const., art. I, § 24; see, e.g., Gay Law Students Assn. v. Pacific Telephone & Telegraph Co. (1979) 24 Cal.3d 458, 469), the district attorney points to no authority which suggests that the California equal protection clause should be interpreted to place greater restrictions on bona fide affirmative action programs than are imposed by the Fourteenth Amendment. To the contrary, our past decisions construing article I, section 7, subdivision (a) reflect this court's recognition of the importance of interpreting the provision in light of the realities of the continuing problems faced by minorities today. (See Crawford v. Board of Education (1976) 17 Cal.3d 280, 301-302.) Viewed from this perspective, we conclude that the state equal protection clause erects no barrier to a municipality's adoption of the kind of affirmative action plan authorized by rule 7.10.

In sum, the race-conscious affirmative action remedy authorized by rule 7.10 violates neither charter, nor statutory, nor constitutional command. Accordingly, we conclude that the trial court erred in striking down rule 7.10 on its face

and in restraining defendants from enforcing the rule in the future.

3. *Because the trial court did not pass on the district attorney's additional contention that the evidence presented at the Commission hearing was insufficient to sustain the remedial order under the requirements of rule 7.10, we remand the case to the trial court for resolution of that issue.*

In addition to challenging the general validity of rule 7.10, the district attorney contends that the specific remedial order at issue in this case is invalid and should be set aside. Although the district attorney does not contest the Commission's findings that minority attorneys are significantly underrepresented in his office or that it would be "feasible" for the office to comply with the hiring order, he argues that the evidence before the Commission does not support the Commission's finding that the current disproportionately low percentage of minority attorneys in his office resulted from discriminatory employment practices. Because of the asserted inadequacy of the record to support this finding—which rule 7.10 itself establishes as a prerequisite to a remedial order under the regulation (rule 7.10, subd. (c)(2))—the district attorney maintains that the order cannot stand.

As noted above, the trial court never passed on this issue, finding it unnecessary to reach the question in light of its findings of the facial unconstitutionality of rule 7.10. Under the circumstances, we conclude that the case should be remanded to the trial court to permit it to address the issue in the first instance.

4. *Conclusion*

The affirmative action plan at issue in this case is but another small but significant step in bringing about the full participation of minority individuals in our society. Although the essence of a democratic society lies in its emphasis upon the rights of the individual, the implementation of those rights has been a long and arduous process. The noble principles of the Constitution were not applied to blacks for nearly a century of our country's life. Even with the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, overt racial discrimination against blacks persisted and was condoned under the pernicious "separate but equal" doctrine. Only in the last quarter century, beginning with Brown v. Board of Education (1954) 347 U.S. 483 and furthered by federal, state and local civil rights legislation, have we undertaken a serious and concerted effort to eliminate the pervasive discrimination long endured by minorities in our society. But the endeavors of the 1950's, 1960's and 1970's have revealed that in light of the history and continuing realities of racial discrimination, the negation of discrimination is frequently not enough. We have found that affirmative steps are at times necessary to overcome the legacy of the past degradation of minorities and to bring minorities into full membership in American society. One such instance of that essential affirmative action is the correction of an employer's past discriminatory employment practice by a race-conscious hiring program such as that of the instant case.

The judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

TOBRINER, J.

WE CONCUR:

BIRD, C. J.

MANUEL, J.

NEWMAN, J.

Price v. Sacramento County Civil Service
Commission and County Board of Supervisors
S.F. 23836

I dissent.

The wry observation of Justice Rehnquist in his dissent in Steelworkers v. Weber (1979) U.S. , ,* applies to this case: "In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea." That one idea is "doublethink," the tortured abuse of words and phrases so that their meaning and effect become inverted.[1] Thus here the majority purport to *eliminate* discrimination by means of *creating* discrimination; they construe *equality* of all persons regardless of race to mean *preference* for persons of some races over others; and a hiring program which *compels* compliance by a reluctant district attorney is described as *voluntary*. George Orwell is nodding complacently in his grave, as he wins vindication even before 1984 for his dire apprehensions about the misdirection of society.

Further adopting doublethink, the majority attempt to apply a semantic salve to their approval of the long-discredited racial quota. They seem to believe the leopard's

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*Advance Report Citation: 47 U.S.L.Week 4851, 4858.

[1]In the "doublethink" and "Newspeak" of Orwell's *1984* a key word is "blackwhite." It means a "loyal willingness to say that black is white," but in addition: "the ability to *believe* that black is white, and more, to *know* that black is white, and to forget that one has ever believed the contrary." (Orwell, *1984* (1949) p. 175).

spots can be changed by calling them stripes, that a quota is somehow less a quota if it bears the label of a "racial hiring ratio" or a "race-conscious hiring program." But the spots are still evident. "Quota" is an abbreviated version of the Latin " *quota pars*," meaning how great a part, or the share or proportion assigned to each member of a total body. One for two, as provided in the Civil Service Commission order involved herein, is purely and simply a racial quota.

Because of the emotion that often beclouds reason when the subject of race is involved, perhaps a disclaimer is appropriate at the outset of this dissent. No member of this court need apologize for his record in opposing racial and sexual discrimination. Over the years we have forthrightly condemned unfair and discriminatory treatment of all persons, regardless of racial or sexual origin, whether that bias was manifest in racial restrictive housing covenants, prohibition of miscegenous marriages, judicial proceedings, employment opportunity or school segregation. We have consistently viewed sympathetically every effort to promote the American dream of equality of rights, duties and opportunity.

That does not mean, however, that we must give carte blanche approval to every proposal, however undemocratic, made in the name of purportedly improving race relations.

Justice Powell, for himself and Justices Stewart and Rehnquist, in dissenting from dismissal of certiorari in *Estes v. Metropolitan Branches of Dallas NAACP* (1980)* —U.S. —, — [62 L.Ed.2d 626, 634, — S.Ct. —] wrote, "The pursuit of racial balance at any cost . . . is without con-

stitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils."

Respondents, now with the imprimatur of the majority, rely on a syllogism. Equality of opportunity is the goal of our society; affirmative action is a desirable method of enabling those who have been victims of prior discrimination to compete on a basis of equality; therefore in the name of affirmative action we must employ the discredited quota system, which is per se unequal and discriminatory, to achieve the goal. I agree with the major premise of the syllogism, and with the minor premise if all proponents can subscribe to one definition of affirmative action.[2] The syllogistic conclusion—calling for a resurrection of a racial quota—is no more acceptable now than it was when the concerted opposition of intellectuals caused its demise several decades ago.

Those who recall the *numerus clausus* of many prestigious American universities before and after the turn of the century have an uneasy feeling of *deja vu.* Now, however, the virus is spreading beyond the field of education into employment and public service. Those who proposed to recast our nation into a representative society, in which ability is secondary to race and sex, are making progress. The progress is attributable to political and social pressures by aggressive exponents of the new racism, and to

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[2]If affirmative action means preparation and training for the underprivileged so that they may have the skills to compete on a basis of equality, then it is an essential program. But if affirmative action is interpreted as justifying preferences in the actual competition for society's benefits, then it is undemocratic and violative of the *equal* protection clauses of the federal and state Constitutions.

apathy by those who still adhere to the traditional American ethic of achievement on the basis of merit.[3]

It was not many decades ago that racial and religious quotas—the *numerus clausus*—governed admissions to a great number of universities, particularly in their professional colleges. An enlightened attitude, prodded by aggressive activity by persons devoted to promotion of democracy, ultimately prevailed: educational institutions became convinced that quotas are essentially undemocratic and unjust. Now the trend, particularly in employment, is being reversed under new demands created by a combination of guilt feelings for the sins of ancestors and overzealousness by those who insist upon reconstructing a merit society into a representative society.

As Professor Alexander Bickel pointed out in The Morality of Consent (1975), pages 132-133: "A quota is a two-edged device: for every one it includes it cuts someone else out. . . . If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the

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[3]The aggressive proponents of the new racism are actually a small segment of the nation's population. Only 11 percent of the people favor preferential treatment; even among non-whites, only 30 percent favor preferences over selection on ability. (Lipset & Schneider, *The Bakke Case: How Would it be Decided at the Bar of Public Opinion* (1978) 1 Public Opinion 38.

same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."

But, argue exponents of the new race-consciousness, their scheme is different: they now propose to use the quota to include, not exclude, racial groups. The answer is obvious: for every person quota-ed in, another is quota-ed out. There is no way in which a numerical quota can be benign. If it favors one, it necessarily rejects another.

In the case at hand, the Civil Service Commission ordered the racial quota to remain in effect until "the percentage of minorities in the classes of Attorney I and

Attorney II in the District Attorney's office is 8%."[4] Why the figure should be 8 percent, and not 4 percent, 16 percent, or 32 percent is not revealed. What is evident, however, is that merit is not the goal, but racial representation in a specific percentage probably related somewhat to that existing in either the community population or the work force.

This requirement of proportionality is inspired by an anachronistic vision of an ideal society, one pervaded by ethnic identification. In that society toward which we are being propelled, the numerical proportionality of races is the principal measure for distribution of society's benefits—not merit, not objective qualification, not competitive achievement.

The foregoing is not a fanciful observation. It can be read into the commission's order and also into Justice Brennan's separate opinion in University of California Regents v. Bakke (1978) 438 U.S. 265, in which he wrote: " . . . States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination." (*Id.*, p. 366.) In other words, race-conscious—read: discriminatory—programs are valid so long as "the evil addressed" is the result of racial discrimination; but "the evil" is used not to describe racial discrimination but "minority underrepresentation." It is minority under-

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[4]This may give an impression of being a mere temporary expedient. But the French, with a cynicism born of experience, have an appropriate saying: "*rien ne dure comme le provisoire*" (nothing lasts like the provisional).

representation that is considered evil per se. Implicit in this premise to which the Civil Service Commission, and now the majority of this court subscribe, is that it is not racial discrimination per se that is objectionable, but the fact that the social structure fails to conform to their concept of model representative employment practices.

This court should not approve the imposition of a racially representative utopia on the people of any political subdivision. As Justice Douglas insisted in his dissent in DeFunis v. Odegaard (1974) 416 U.S. 312, 342, such a concept runs counter to the very theory of equal protection: "The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

It is now clear that undergirding much of the rhetoric supporting racial quotas, and preferential treatment in general, is a view of justice that demands not that the state treat its citizens without reference to their race, but that it rearrange and index them precisely on the basis of their race. The objective is not equal treatment but equal representation.

The majority here rely primarily on two recent Supreme Court cases: *Bakke* and *Weber*. Neither lends them any comfort; indeed, both support the conclusion of the trial court.

In our decision in *Bakke* this court manifested specific disapproval of racial quotas. (Bakke v. Regents of University of California (1976) 18 Cal.3d 34, 62.) We declared that no program "in history has been so thoroughly discredited in contemporary times as the use of racial percentages." The doctrine of stare decisis should dictate adherence to that elementary truth a bare three years after it was declared. Previous opinions, particularly when approved in substance by the United States Supreme Court, remain binding, even though, to use the words of Justice Marshall, "the composition of this Court has radically changed." (Lloyd v. Tanner (1972) 407 U.S. 551, 584 (Marshall, J., dis.).)

Since they cannot rely on a single prior decision of this court, the majority devote many pages of analysis in a futile effort to avoid the reality of the United States Supreme Court decision in *Bakke*. It can be argued that conclusions about individual justices' opinions lie in the eye of the beholder. But no matter how disingenuous the majority here become, they cannot escape the one undeniable result: *the Davis medical school 84-16 admission quota plan was declared invalid* and Allan Bakke, a white male who alleged racial discrimination because of the quota, was ordered admitted to the school.

If there be any doubt, here are the key holdings of Justice Powell in his lead opinion for himself and for Chief Justice Burger, Justices Stewart, Rehnquist and Stevens: "In summary, *it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court.* It tells

applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class . . . . *The fatal flaw in* [*the Davis*] *preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.*" (438 U.S. at pp. 319-320; italics added.) Therefore, held the Supreme Court (at p. 320), "that portion of the California court's judgment holding [the Davis] special admissions program invalid under the Fourteenth Amendment must be affirmed."[5]

Among the strange arguments advanced to justify racial quotas is criticism of Justice Powell's opinion in *Bakke* declaring that equal protection "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." (*Id.* at pp. 289-290.) One would have thought that principle to be unexceptionable, but do not underestimate the guile of the prolific apologists for modern racism.

The Powell passage is "quotable" but "ill-considered," writes Kenneth W. Simons in *Philosophical Perspectives on Affirmative Action* (1979) 77 Mich.L.Rev. 513, 518-519. "Courts may treat the discriminations differently . . . blacks, but not whites, fall under it." In other words, equal protection depends upon skin pigmentation! I cite this as an illustration of the excesses and the obscurantism which permeate the drive to restructure ours into a wholly repre-

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[5]The only portion of our *Bakke* judgment reversed was that which prohibited all consideration of race. The high court would permit an admissions program "involving the competitive consideration of race and ethnic origin." (438 U.S. at 320.)

sentative society. The majority fall into the same error: paradoxically they perpetuate elitism in order to preserve egalitarianism.

Parenthetically, I note that in his *Bakke* opinion and appendix Justice Powell referred with approval to the admissions policies of Harvard University. The history of Harvard on racial quotas is instructive. In 1922, then President Lowell made a public statement, declaring that racial quotas were under consideration, words that were ominous in the xenophobic post-World War I milieu. A Committee of Thirteen was appointed by the Overseers in 1922 and ultimately submitted a report firmly rejecting the notion of racial quotas. The faculty adopted the report, and it has remained university policy to this day. (See Dean Rosovsky, *From Periphery to Center*, Harv. Magazine (Nov.-Dec. 1979) p. 81 ff.)

Consistent with the views of Harvard on quotas, the court in *Bakke* not only did not approve, but specifically invalidated the 84-16 quota system used at Davis. Thus reliance on *Bakke* is clearly counterproductive to the majority. Next they lean heavily but with equal futility on *Weber,* a case in which five justices did uphold a racial classification program at the plant of the Kaiser Aluminum & Chemical Corporation, a private employer, which had entered into an employment contract with the United Steelworkers of America, a union representing the private employees. (Justices Powell and Stevens, who had been in the *Bakke* majority, did not participate in *Weber.*)

Weber, as stressed repeatedly by its majority, is factually inapposite to a compulsory program involuntarily

imposed on and by a public agency. Justice Brennan, writing the lead opinion in which Justices Stewart, White, Marshall and Blackmun joined, declared over and over that the Kaiser plan "does not involve state action" and therefore he emphasized "the narrowness" of the inquiry (*id.*, p. .....). Indeed, on almost every page of his opinion, Justice Brennan spoke redundantly of the parties "voluntarily agreeing" (*id.*, p. .....), Congress "did not intend wholly to prohibit private and voluntary" efforts (*id.*, p. .....), Congress did not intend to prohibit acts by "the private sector" (*id.*, p. .....), there is no absolute prohibition against "all private, voluntary" action (*id.*, p. .....), there is no "legislative prohibition of all voluntary, private" efforts (*id.*, p. .....), legislators "resisted federal regulation of private business" (*id.*, p. .....), "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary" action (*id.*, p. .....), Title VII "does not condemn all private, voluntary" plans (*id.*, p. .....), Title VII permits discretion for plans adopted in "the private sector voluntarily" (*id.*, p. .....).

If there is any other manner of expression by which the Supreme Court could have made it more clear in *Weber* that it approved the plan because it was *voluntary*, not involuntary as here, and in *private industry*, not in the public realm as here, it escapes me as it apparently eluded Justice Brennan. I am confident, in view of the obvious significance of its repeated and emphasized qualifications, that the Supreme Court would have reached a contrary result if racial preferences had been imposed *involuntarily* by a *public agency* and affected *public employment*.

In short, just as there is no California authority there is no persuasive rationale in United States Supreme Court cases supporting compulsory imposition of racial quotas in public employment.

Finally, the majority read Title VII of the federal Civil Rights Act as if it were designed to protect minorities only. This view offends the thoughtful opinion of Justice Marshall for a unanimous court in McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273. He reviewed the congressional history of Title VII and concluded it "was intended to 'cover white men and white women and all Americans' " and it created an " 'obligation not to discriminate against whites' " (*id.*, p. 280). A quota system that excludes whites from one out of three appointments to public employment solely on the basis of their race is manifestly discriminatory.

It is significant that in his *Weber* opinion Justice Brennan did not quarrel with *McDonald*. Indeed, he declared that an argument based on *McDonald* was "not without force" but he found it not to be controlling because the Kaiser plan in *Weber* was "voluntarily adopted by private parties." (*Weber*, at p. .....) Once again the implication is clear that if a compulsory program for public employment was involved, *McDonald* would control.

Griggs v. Duke Power Co. (1971) 401 U.S. 424, 430-431, another unanimous decision, clearly holds Title VII "does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and

only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Under compulsion of *Weber* I would be required to agree with the majority that a voluntary program in private enterprise would not offend Title VII.[6] But that is not this case—I repeat: this is a *compulsory* program in *public* employment, an employment paid by the taxpayers of all races and both sexes. The majority nevertheless indulge in a travesty of retroactive myth to bend the history of Title VII, and its unequivocal language, to serve the very purpose the act was intended to prohibit. Justice Rehnquist reminds us of the congressional history in his devastating dissent in *Weber*. Senators Humphrey, Dirksen, Kuchel, Clark and Case, ardent proponents of the Civil Rights Act, assured their colleagues over and over that racial quotas were not contemplated and were unacceptable. To assert otherwise is flagrant history revisionism.

One illustration will suffice. On March 30, 1964, Senator Hubert H. Humphrey led the debate in the Senate on the Civil Rights Act. He analyzed the measure, section by section, in order to persuade the Senate to adopt the proposal, which had both bipartisan support and opposition. When Senator Humphrey came to Title VII, he reassured the Congress as follows:

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[6]Racial quotas in private industry have never been approved by this court. Indeed, we specifically disapproved such hiring practices in Hughes v. Superior Court (1948) 32 Cal.2d 850, 856.

"Contrary to the allegations of some opponents of this title, *there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.* [¶] That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion. [¶] In Title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit. . . ." (Italics added.)

Dr. John H. Bunzel, former President of San Jose State University, has concluded that "When the Civil Rights Act of 1964 was passed, Congress reflected the general normative consensus that Americans wanted not only to eliminate discrimination but to make employment opportunity independent of race, colour, religion, sex or national origins. The law intended to 'bring Americans together', not to separate them into categories. It was a sentiment expressed by individuals and groups from every walk of life who participated in the legislative process that gave political sanction *not* to racially preferential treatment, or special privileges for some, or the concept of statistical parity among groups, but to the *elimination of discrimination* against anyone." (Bunzel, *Affirmative Action, Negative Results,* Encounter (Nov. 1979) 43, 51.)

The Supreme Court majority in *Weber* avoided the congressional history by drawing a distinction between *re-*

quiring quotas and *permitting* quotas. The former is prohibited, the latter tolerable.

Accepting that rational at face value, I would hold that the Civil Service Commission's quota must fall. There can be no question that its formula is compulsory, the District Attorney being compelled to adhere to it in all hiring. And obviously, the emphasis placed in *Weber* on private industry cannot be related to public employment which by law must be governed by merit selection. Sac. County Charter, art. XVI, § 71-F, subds. (a)-(c).) The majority try in vain to find authorization for racial quotas in county charter Sections 61 and 71-F, subdivision (f). But the sections, recited in footnote 7 of the majority opinion, pointedly prohibit discrimination on the basis of race, color, creed, sex, national origin or political affiliation. Some exception is provided for "economically, socially, physically or mentally deprived persons" *of all races.* The Civil Service order in this case does not involve any of such persons, only the prohibited categories of race and sex.

While I need not discuss the merits of the commission's program, or of rule 7.10 upon which it is based, I cannot resist observing that the scheme is hopelessly flawed and that it is unlikely to serve the purpose for which it is purportedly devised.

Rule 7.10 provides that minority personnel shall be appointed in a number "necessary to attain a fair approximation of minority representation in the classification consistent with the population mix in the County of Sacramento." Minorities are defined as "Blacks, Indians, Mexican-Americans, Spanish-Americans, Orientals, other non-Whites

and women." Whoever drafted that definition obviously lacked knowledge of modern demography, for women, ever since World War II, have been a majority in our society, not a minority.

Under the rule, however, the district attorney could appoint one white female for every two white males and he would satisfy the commission. But would he satisfy the Blacks, Indians, Mexican-Americans, Spanish-Americans, Orientals or other non-Whites? I doubt it. The result would be what historians call the Law of Unintended Consequences. See, e.g., White, In Search of History (Warner Books ed 1979) p. 304.

Therein lies one of the numerous vices in compelling such artificial devices as racial quotas in employment. Inevitably one minority group will not be placated by the selection of a member of another group. Even if it were possible for representation to be predicated on population, a qualified Samoan or Eskimo would have no chance of employment because the numbers of his race in our state population total is infinitesimal.

There are innumerable other imponderables that emerge in the race-typing business. I suggest only a cursory sample. What percentage of blood makes one a Black or an Indian—75 percent, 50 percent, 25 percent? Does the term Indian apply to native Americans or to natives of India? The Spanish-American category would include a person from Argentina, but not one from Brazil because the latter would be a Portuguese-American. How long is a person deemed to be a Mexican-American before he loses the hyphenation—for one generation after his parents

crossed the border, for two generations, forever? Why are only racial minorities enumerated and not religious minorities, when it is a fact of history that religious discrimination has been a pervasive element in American life from early colonial days?[7]

These defects are not endemic to the Sacramento program alone, they are the inevitable by-product of injection of race as an employment qualification. Thus they, or similar fatal flaws, would appear in any employment scheme that emphasized race, or group characteristics, rather than individual merit.[8]

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[7]For a discussion of other insoluble dilemmas in assigning benefits: to which races, how much to each race, which test of race is to be used, see Van Alstyne, *Rites of Passage* (1979) 46 U.Chi.L. Rev. 775, 804-808.

[8]Vertification of confusing and false ethnic claims for purposes of teacher assignment plagued the Los Angeles Unified School District in 1976 and 1977. To avoid being included in a compulsory program involving transfer to a distant school, some white teachers were declaring themselves black, some black teachers insisted they were white, others were asserting they were of American Indian origin.

The district thereupon created an Ethnic Designation Committee which promulgated a precise series of proof requirements to establish the ethnicity of teachers. The criteria employed by the district to determine the ethnic makeup of individual teachers included: verification of racial or ethnic ancestry to the grandparents' generation; birth certificates of the individual and his parents and grandparents; affidavits by a school administrator and a clergyman attesting to the teacher's racial identity. (See Los Angeles Unified School District, Memorandum No. 10, Feb. 2, 1977.)

This tracing of blood lines back to grandparents by a public agency bore remarkable similarity to the Nuremberg Laws of Nazi Germany, a fact that did not escape the attention of some civil rights groups in Los Angeles. After a public protest, on May 18,

The district attorney pointed out that he had practical difficulty in recruiting minorities because most of those who were well qualified preferred to accept appointment from the public defender or other governmental agencies. This problem of selecting qualified persons for professional employment was mirrored in comments about the judiciary by then Attorney General Griffin Bell in an address to the American Law Institute on May 18, 1979 (63 Judicature at p. 118): "The influx of women and minorities into the bar is still a recent phenomenon, and there is not yet a large pool of women and minority lawyers of sufficient maturity and experience . . . Thus, the process is fraught with tension . . . ." As to this tension, the President of the United States on Law Day, 1979, declared firmly that "Basing present discrimination on past discrimination is obviously not right." (47 U.S.L. Week 2726.)

In October 1977, the United States Commission on Civil Rights issued a formal statement on affirmative action. In it the commission urged removal of "institutional obstacles to *equal* employment opportunity" (italics added), and while it encouraged achievement goals, it time and again warned against fixed racial quotas. (See U.S. Com. on Civil Rights, Toward an Understanding of Bakke (1979) p. 183.) Its conclusion was, that although we are far from achieving our goal, the "aspiration of the American people is for a 'colorblind' society, one that 'neither

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1977, the district announced it would no longer implement Memorandum No. 10.

It will be recalled that the racial identification policies of Nazi Germany began with the civil service.

knows nor tolerates classes among citizens'." Again in its November 1979 bulletin (Civil Rights Update) the commission reported that the Department of Health and Social Services has issued guidelines on college admission policies "without violating the ban on strict racial or ethnic quotas in the U.S. Supreme Court's *Bakke* decision." Thus it is clear that the federal agency directly concerned with eliminating discrimination understands, as a matter of administrative interpretation, that racial quotas are forbidden.

A few apologists for racial quotas are becoming somewhat restive at the excesses such programs spawn. Professor Bernhardt, while analyzing and approving *Weber* in 65 A.B.A.J. 1321, concludes by warning that "Allowing choice based on race admittedly is a dangerous step, and future developments should be watched to prevent affirmative action programs from becoming a new tyranny." We are, indeed, on the pathway to that new tyranny.

Justice Black once declared, "Great nations, like great men, should keep their word." (F.P.C. v. Tuscarara Ind. Nat. (1960) 362 U.S. 99, 142.) Our nation gave its word over and over again; it promised in every document of more than two centuries of history that all persons shall be treated *equally*. However it is rationalized, a preference to any group constitutes inherent inequality. Moreover preferences, for any purpose, are anathema to the very process of democracy. As Justice Murphy wrote, "We of this nation are one people undivided in ability or freedom by differences in race, color or creed." (Akins v. Texas (1945) 325 U.S. 398, 410.)

At the dawn of a new decade, this court has a rare opportunity to offer a ringing declaration in support of racial equality. Unfortunately the majority elect to approve a preferential and undemocratic program of expediency; the result is likely to convert the 1980's to a decade of disillusionment, an era in which "racism, racial spoils systems, racial competition, and racial odium will be fixtures of government in the United States even into the twenty-first century." (Van Alstyne, supra, 46 U.Chi.L.Rev. at p. 78.) We must, in the words of Justice Jackson, "avoid these ends by avoiding these beginnings." (West Virginia State Bd. of Educ. v. Barnette (1943) 319 U.S. 624, 641.)

In addition to all else, the revival of racial quotas tragically denigrates the eloquent words of the first Justice Harlan, dissenting in Plessy v. Ferguson (1896) 163 U.S. 537, words that have served as an inspiration to civil rights advocates for more than eight decades: "Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . . . It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race."

Racism will never disappear by employing devices of classifying people and of thus measuring their rights. Rather, wrote Professor Van Alstyne, "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own

life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding." (46 U.Chi. L.Rev. at pp. 809-810.)

There is no United States Supreme Court case upholding racial quotas in public employment. There is no California case upholding racial quotas in any employment. The majority opinion is wholly unsupported by precedent and worse, it is regressive in concept. Therefore, I agree with the Court of Appeal that the judgment of the trial court should be affirmed.

MOSK, J.

WE CONCUR:
CLARK, J.
RICHARDSON, J.

S.F. No. 23836

In the Supreme Court
of the
State of California

Appeal
County Sacramento
Superior Court No. 257623

John M. Price, as District Attorney, etc.,
Plaintiff and Respondent,

vs.

Civil Service Commission of Sacramento County et al.,
Defendants and Appellants.

The above-entitled cause having been heretofore fully argued, and submitted, it is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court of the County of Sacramento in the above-entitled cause, is hereby reversed and the case is remanded to the trial court for further proceedings consistent with the opinion of the Court. Appellants shall recover their costs on appeal.

I, , Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 25th day of January, 1980.

Witness my hand and the seal of the Court, this 21st day of March, 1980.

[SEAL]

Clerk

By G. E. SCHNEIDER
Deputy

S.F. No. 23836

In the Supreme Court
of the
State of California

John M. Price, as District Attorney, etc.,
Plaintiff and Respondent,

vs.

Civil Service Commission of Sacramento County et al.,
Defendants and Appellants.

[Filed Mar. 20, 1980]

MODIFICATION OF OPINION

The dissenting opinion herein, appearing at 26 Cal.3d 257, is modified by striking the last sentence of text on page 287, and substituting therefor the following: Justice Powell, for himself and Justices Stewart and Rehnquist, in dissenting from dismissal of certiorari in Estes v. Metropolitan Branches of Dallas NAACP et al. (1980) ..... U.S. ....., ... (48 U.S. L. Week 4118, 4122) wrote, "The pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils."

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S.F. No. 23836

In the Supreme Court
of the
State of California

IN BANK

Price, as District Attorney, etc.

vs.

Civil Service Commission of Sacramento et al.

[Filed Feb. 19, 1980]

The time for granting or denying a rehearing in the above cause is hereby extended to and including March 25, 1980 or the date upon which a rehearing is either granted or denied.

/s/ BIRD
Chief Justice

S.F. 23836

In the Supreme Court
of the
State of California

John M. Price, as District Attorney, etc.,
Plaintiff and Respondent,
vs.
Civil Service Commission of Sacramento County et al.,
Defendants and Appellants.

[Filed Mar. 20, 1980]

ORDER

PETITION FOR REHEARING is denied.

In the Court of Appeal of the
State of California
Third Appellate District

3 Civil No. 16302

Jan. 30, 1978

John M. Price, as District Attorney, etc.,

Plaintiff and Respondent,

vs.

The Civil Service Commission of Sacramento County et al.,

Defendants and Appellants.

OPINION

Friedman, J.—The Civil Service Commission of Sacramento County promulgated rule 7.10, establishing a minority quota hiring system whenever necessary to remedy an imbalance in county agencies.[1] After hearings, the commission issued an order finding that minorities were under-represented among the attorney personnel of the Sacramento District Attorney's office; that the under-representation resulted from unintentionally discriminatory practices, including "unvalidated" oral examinations and insufficient recruitment efforts. The order directed that appointments in the Attorney I (the entry level) classification in the district attorney's office be made "on the basis of an alternating ratio of 2:1 so that at least one minority

[1]Rule 7.10 defines "minority personnel' to include Blacks, Indians, Mexican-Americans, Spanish-Americans. Orientals other non-Whites and women.

person is appointed for every two non-minority persons" until the percentage of minorities in the Attorney I and Attorney II classes reached 8 percent.

The district attorney filed a mandate petition in the superior court, naming as defendants the civil service commission and the board of supervisors. His petition sought abrogation of the commission's rule and order. The trial court granted a peremptory writ, concluding that the civil service commission's rule and order on their face unconstitutionally discriminated against nonminority persons. The defendants appeal.

We sustain the trial court's ruling but without passing upon the denial-of-equal-protection theory adopted by the trial judge. Courts do not engage in constitutional inquiries when other grounds of decision are available. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65-66 [195 P.2d 1].) We have concluded that the minority preference order of the civil service commission violates the Sacramento County Charter and exceeds the authority granted by title VII of the federal Civil Rights Act of 1964.

I

The district attorney has standing to maintain this lawsuit. Public officials possess the powers expressly granted by law and such additional powers as may fairly be implied from those expressly granted. (*In re Cathey* (1961) 55 Cal.2d 679, 689 [12 Cal.Rptr. 762, 361 P.2d 426].) The district attorney is authorized to appoint deputies "for the prompt and faithful discharge of the duties of his office." (Gov. Code, § 24101.) Subject to valid restrictions imposed by the civil service system, the district attorney has implied power to select and promote deputies in such manner as he

believes will best promote the efficiency and effectiveness of his office. When, in his opinion, a civil service restriction upon his power of appointment is illegal, the maintenance of a lawsuit to test its validity is within his implied authority.[2]

II

Sacramento is a chartered county. Article XVI of the charter deals with personnel administration. Section 71-B(a) of article XVI empowers the civil service commission to establish rules for the selection and classification of civil service employees. Section 71-C(b) directs the county executive to classify civil service positions and to administer examinations, subject to approval of the commission. Section 71-F declares that all appointments in the civil service "shall be based on relative fitness as ascertained by competitive examinations;" that eligible lists shall be established containing names of successful candidates in the order of their standing in examination; that an appointment shall be made from among the eligibles whose scores at the time of certification represent the three highest ranks on the list. Section 71-F(f) prohibits any favor or discrimination among applicants or employees because of race, color, creed, sex, national origin or political affiliation.

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[2]*Safer v. Superior Court* (1975) 15 Cal.3d 230, 240 [124 Cal.Rptr. 174, 540 P.2d 14], is not apropos. There the court barred a district attorney from intervening in a contempt proceeding stemming from private civil litigation, holding that neither "specific" statute nor inherent power permitted it. In demanding "specific" statutory authority, the court rejected the concept of a vague penumbra of powers to participate in a civil proceeding. A power may be "specific though implied. Unlike the present case. *Safer* did not deal with an express grant of authority from which an implied, specific power might be drawn.

The rules of the civil service commission contain a section 5 dealing with examinations. Section 5 commences with the following recital: "It is the policy of the County to seek the best-qualified persons available for each job in County service, and to encourage persons to compete for the best jobs for which they are qualified without regard to race, color, religion, sex, national origin or political belief."

Rule 5.4 permits oral examinations; these are to be administered by a panel consisting of a representative of the department of personnel management, one or more persons not in the county service, one or more persons in the county service familiar with the particular job requirements and one or more members of an ethnic minority group.

Section 6 of the rules directs preparation of an eligible list containing names in the order of the final examination ratings. Central to this controversy is rule 7.10, entitled "Minority Preference Appointment." Subdivision (a) of the rule recites in purpose "to provide a procedure for adjustment of disproportionate representation of minority personnel . . . which is a result of discriminatory employment practices." Subdivision (c) provides for an order directing minority appointment preference if, after a public hearing and reception of evidence, the commission finds that (1) the number of minority personnel in a classification is disproportionately low in relation to the county population mix, (2) the disproportion was caused by discriminatory employment practices, and (3) it is feasible to adjust the disproportionate representation by requiring preferential appointment of minority persons on an eligible list.

After a series of hearings the commission, in September 1975, adopted findings and an order relative to civil service attorney classes in three county legal agencies. According to the findings, minorities were under-represented in the county counsel's office but because of a low turnover rate a minority preference order was not feasible; the number of minority attorneys in the public defender's office had increased recently until the proportion was close to the minority population mix of that county. The commission found that the district attorney's office contained approximately 65 attorney positions, only one of which was filled by a minority person; that the percentage of minorities (other than female) in the general population mix of the Sacramento area was approximately 19.5 percent. According to the findings, there was no evidence that this disproportion had resulted from intentionally discriminatory practices; rather, the under-representation had been caused by unintentionally discriminatory practices of both the county and the district attorney, including (a) the discriminatory effect of the county's civil service system; (b) the administration of unvalidated "oral only" examinations; (c) the district attorney's lack of special minority recruitment efforts; and (d) the district attorney's failure to offer civil service appointments to minority persons in legal trainee positions.[3] The commission's action of September 1975 concluded with the numerical hiring order under attack.

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[3]The commission's findings recite also that some "appointable" candidates had declined offers of employment in the District Attorney's office, preferring to accept employment with the public defender.

"The provisions of a charter are the law of the State and have the force and effect of legislative enactments." (Cal. Const., art. XI, § 3, subd. (a).) The Sacramento County charter authorizes the civil service commission to adopt rules for the selection of civil services employees and to carry out its powers and duties. (Charter, art. XVI, 71-B(a) and (g).) An administrative agency may not adopt a rule which amends the law it administers or which enlarges or restricts its scope; such a rule is void. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 419-420 [128 Cal.Rptr. 183, 546 P.2d 687]; *Ralphs Grocery Co. v. Reimel* (1969) 69 Cal.2d 172-175 [70 Cal. Rptr. 407, 444 P.2d 79].)

In article XVI, section 71-F(f) the county charter prohibits appointment, favoritism or discrimination on grounds of race, color, creed, sex, national origin or political affliation.[4] Section 71-F(c) assures appointments based upon ranking as established by competitive examination scores. It declares: "For the filling of one vacancy, the appointment shall be made from among the eigibles whose scores, at the time of certification, represent the three highest ranks on the list."

Defendants have not directed us to any charter provision permitting alteration or disregard of these requirements. In rule 7.10(g), the commission has assumed authority to order certification of minority eligibles ahead of nonminority candidates when necessary to implement a

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[4]The prohibition is tempered by permission for "special programs for the employment of economically, socially, physically or mentally deprived persons."

minority preference order. In effect, the commission's order directs the district attorney to hire candidates on an alternating ratio of two-to-one without regard to minority candidates' positions on the eligibility list.

The order injects racial, ethnic and gender qualifications into a hiring system whose charter commands disregard of race, ethnicity and gender. In directing hiring preference for minority persons, the commission's directives violate the charter prohibition against racial, ethnic and gender favoritism. In calling for the appointment of any person below the third place on an eligibility list, they violate the charter's mandate for appointment of competitively ranked candidates at the head of the eligibility list.

III

In the elimination or prevention of employment discrimination, state law is not the sole measure of government personnel agencies' authority. The 1972 amendment of section 701, title VII of the federal Civil Rights Act of 1964 extended that act's antidiscrimination provisions to state and local governments. (42 U.S.C. § 2000e-2(a) and (b); *Monell v. Dept. of Soc. Serv. of City of New York* (2d Cir. 1976) 532 F.2d 259, 261; *Lindsay v. City of Seattle* (1976) 86 Wn.2d 698 [548 P.2d 320, 321].)

Section 703(a) of title VII (42 U.S.C. § 2000e-2(a)) prohibits an employer from rejecting applicants for employment and from segregating or classifying employees or applicants in any way tending to deprive an individual of employment opportunity because of his race, color, religion,

sex or national origin. "Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." (*Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 44 [39 L.Ed.2d 147, 155, 94 S.Ct. 1011].)

The district attorney seeks to eliminate title VII as the legal underpinning of the civil service commission's directive, contending that the statute confers enforcement jurisdiction upon the federal courts but grants no authority to the commission to "suspend the civil service rules." As to this point he errs. In view of the supremacy clause (art. VI, § 2) of the federal Constitution, directions and delegations of authority, emanating from title VII prevail over inhibitions in state law and county charter. (See *Nash v. Florida Industrial Comm'n* (1967) 389 U.S. 235, 239 [19 L.Ed.2d 438, 442, 88 S.Ct. 362]; *Lindsay v. City of Seattle, supra,* 548 P.2d at p. 327.) Title VII seeks cooperation and voluntary compliance as the preferred means of attaining its goal. (*Alexander v. Gardner-Denver Co., supra,* 415 U.S. at p. 44 [39 L.Ed.2d at p. 155].) Restrictions of local law cannot insulate the county's employment policies from national policy. Authority for voluntary action flows directly from title VII to the county civil service commission, as the charter-designated administrator of the county personnel system.

Only in a limited juridical sense is the lawsuit an adversary challenge by one county agency against another. In a more comprehensive sense, the commission's order to the district attorney represents a voluntary action by the county

to achieve the objective of title VII by correcting Caucasian male over-representation in one segment of the county government. "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." (*Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 429-430 [28 L.Ed.2d 158, 163, 91 S.Ct. 849]; see also, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 800 [36 L.Ed.2d 668, 676-677, 93 S.Ct. 1817].)

Indeed, the civil service commission makes no effort to escape a *mea culpa*. Its order of September 25, 1975, distinctly declares that the under-representation of minorities in the district attorney's office is caused in part by the discriminatory effect of the county's "traditional" civil service system. It declares that the oral examinations for the Attorney I class have never been "validated" in accordance with accepted standards.[5] Under the charter the commission itself, not the district attorney, bears responsibility for these unvalidated examinations.

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[5]In the parlance of equal opportunity legislation, a validated qualification test is one which demonstrably tends to test ability to perform the job. (See *Washington v. Davis* (1976) 426 U.S. 229, 247, fn. 13 [48 L.Ed.2d 597, 612, 96 S.Ct. 2040].) Guidelines of the Equal Employment Opportunity Commission (EEOC) approved by the federal Supreme Court equate a validated test with one "'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" (*Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 431 [45 L.Ed.2d 280, 304, 95 S.Ct. 2362].)

The district attorney does not challenge the commission's finding of only one minority person among the 65 lawyers on his staff. When hiring practices result in a substantial disproportion of minority employees, discriminatory purpose need not be proved; neutrality of intent is no defense. (*Washington v. Davis, supra,* 426 U.S. at pp. 246-247 [48 L.Ed.2d at pp. 611-612]; *Griggs v. Duke Power Co., supra,* 401 U.S. at p. 430 [28 L.Ed.2d at p. 163].) The disproportion elicited the commission's directives. These directives represent Sacramento County's voluntary effort to attain the objective of title VII. The central question is whether the commission's choice of a minority quota system of hiring is a permissible means of reaching that objective.

IV

The central question transports the appeal into the vexing and significant arena of affirmative action, "benign" quotas and minority preference plans. The inquiry is not constitutional; hence, it is unnecessary to verbalize constitutional policies or to consult the constitutional-social-moral predilections of the judges. We act as the faithful exponent of congressional policy. The only question is whether Congress intended to permit minority preference hiring as a means of integrating an employer's work force.

Section 703(a)(2) of title VII (42 U.S.C. § 2000e-2(a)(2)) prohibits the classification of employees or applicants for employment in any way which would deprive any individual of an employment opportunity because of his race, color, religion, sex, or national origin. Section 703(j) declares that nothing in title VII "shall be interpreted to require any employer . . . to grant preferential

treatment to any individual or to any group because of . . . race, color, religion, sex or national origin . . . on account of any imbalance which may exist with respect to the . . . percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the . . . percentage of persons of such race, color, religion, sex or national origin in any community . . . or in the available work force. . . ."

On their face, these statutes appear to prohibit the numerical hiring scheme embodied in the order of the civil service commission. The scheme makes minority status a qualification for each third opening in the Attorney I class in the district attorney's office. Contrary to the seeming letter of section 703(a)(2), it classifies individuals in a way depriving Caucasian males of eligibility for that third job. According to a fair reading of section 703(j), the prohibition in section 703(a)(2) is not to be sidestepped by reason of an existing imbalance. Section 703(j) draws no apparent distinction between imbalances caused by one circumstance or another. If section 703(a)(2) prohibits minority hiring preferences to remedy an imbalance caused by past discrimination, section 703(j) seems to express congressional intent to preserve that prohibition, intact and undiminished.

This view of the statute is strongly supported by a generalization voiced by the federal Supreme Court. In *McDonald* v. *Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273 [49 L.Ed.2d 493, 96 S.Ct. 2574], the court held that white employees were entitled to relief when the employer dis-

missed them for misbehavior but retained a similarly situated Black employee. Speaking for a unanimous court, Mr. Justice Marshall declared that title VII is not limited to discrimination against members of any race; that it prohibits discriminatory preference for any racial group, minority or majority; that the EEOC, whose interpretation is entitled to great deference, has consistently interpreted title VII to proscribe racial discrimination against whites on the same terms as racial discrimination against nonwhites. (*Id.*, at pp. 278-280 [49 L.Ed.2d at pp. 499-501].) In the same case the court expressly withheld judgment on the permissibility of affirmative action programs which include racial preferences in employment "whether judicially required or otherwise prompted." (*Id.*, at p. 281, fn. 8 [49 L.Ed.2d at p. 501].)

In an earlier decision, the high tribunal had described title VII in language which hardly concealed its disapproval of that variety of affirmative action which calls for minority preference hiring. "In short [title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at pp. 430-431 [28 L.Ed.2d at pp. 163-164].)

The court's vigorous declaration in *McDonald* sharply undercuts earlier decisions of federal courts of appeal. These decisions had limited section 703(j), holding that it prohibits minority quota hiring designed to attain racial balance but permits it when designed to correct imbalances

caused by past discrimination. (E.g., *Patterson* v. *American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 273-274; *United States* v. *Wood, Wire & Metal Lath. Int. U., Loc. No. 46* (2d Cir. 1973) 471 F.2d 408; *Rios* v. *Enterprise Ass'n Steamfitters Loc. 638 of U.A.* (2d Cir. 1974) 501 F.2d 622, 630; *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher* (1st Cir. 1974) 504 F.2d 1017, 1028; *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor* (3d Cir. 1971) 442 F.2d 159, 173; *United States* v. *International Bro. of Elec. Wkrs., L. No. 38* (6th Cir. 1970) 428 F.2d 144, 149; see comment (1977) 8 Pacific L.J. 49, 56-64.) Thus, these decisions approved quota hiring schemes, although with declared reluctance, permitting them only as "temporary" expedients to be employed in "extreme" cases. (See e.g., *Western Addition Community Organization* v. *Alioto* (9th Cir. 1975) 514 F.2d 542, 544.) Consistently with these federal decisions the Washington Supreme Court sustained a municipal affirmative action program, holding that title VII permits a voluntary quota hiring system to eradicate the effects of past discrimination in a city department (*Lindsay* v. *City of Seattle, supra,* 548 P.2d at p. 324.)

A few federal judges have criticized these decisions, charging them with disregard of congressional intent. (*Patterson* v. *American Tobacco Co., supra,* 535 F.2d at pp. 276-277 (conc. and dis. opn. of Widener, J.). *Rios* v. *Enterprise Ass'n Steamfitters Loc. 638 of U.A., supra,* 501 F.2d at pp. 634-637 (dis. opn. of Hays, J.); *Cramer* v. *Virginia Commonwealth University* (E.D. Va. 1976) 415 F.Supp. 673, 679-680.) Several state courts have nullified minority

preference programs of state or municipal agencies, holding that these programs discriminate against whites, contrary to the mandate of title VII. (*Lige* v. *Town of Montclair* (1976) 72 N.J. 5 [367 A.2d 833]; *Chmill* v. *City of Pittsburgh* (1977) — Pa. Commw.Ct. — [375 A.2d 841].)

The decisions sustaining racial hiring quotas are inconsistent with the federal Supreme Court's later declaration in *McDonald* and its earlier statement in *Griggs*. They rest upon a misreading of title VII, violate congressional intent and should not be followed.[6] By tolerating minority status as a qualification for employment, they clash with title VII's objective of eliminating all racial, ethnic and gender qualifications.

At one point title VII draws a distinction between deliberate and nondeliberate imbalance and between corrections available through EEOC enforcement suits and those available through other means. As we have observed, section 703(j) declares that title VII does not command minority preference "on account of any imbalance." A provision of comparable importance is section 706 (42 U.S.C. § 2000e-5) and particularly subdivision (g) of that section. Section 706 deals with employment discrimination charges before the EEOC and with lawsuits brought in the federal courts after EEOC hearings. According to subdivision (g) of section 706, a judicial finding of deliberate

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[6]State courts are bound by the federal Supreme Court's interpretation of federal statutes, but decisions of lower federal courts are merely persuasive and will not bind the state courts where their reasoning appears erroneous. (*Central Bank v. Superior Court* (1973) 30 Cal.App.3d 962, 967 [166 Cal.Rptr. 912].)

discrimination may result in an order to the employer to take such affirmative action as may be appropriate.[7] At this point two observations are in order: First, the decisions upholding quota hiring pay inadequate heed to the fact that section 706(g) is confined to federal-court-controlled actions against intentionally discriminating employers. Second, the Sacramento County Civil Service Commission has found only unintentional discrimination; its order is aimed at conduct outside the restricted ambit of section 706(g). That provision supplies no foundation for the present quota hiring order.[8]

The title VII decisions sustaining minority preference plans rest on the assumption that section 703(j) "was intended to bar preferential quota hiring as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct [and] does not prohibit the use of goals 'to eradicate the effects of past dis-

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[7]We quote section 706(g) at somewhat greater length: "If the [federal] court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any of other equitable relief as the court deems appropriate."

[8]The distinction in section 706(g) between unintentional and intentional discrimination is not merely technical. Even on the assumption that section 706 authorizes minority preference hiring as one sort of affirmative action, it confines this sort of affirmative action to federal court decrees against deliberately discriminating, recalcitrant employers after fruitless EEOC proceedings.

criminatory practices.'" (*Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., supra,* 501 F.2d at p. 630.) The assumption collides resoundingly with the legislative hostory of title VII.

The bill which became the Civil Rights Act of 1964 originated in the House of Representatives as H.R. No. 7152. As reported to the House, it did not contain section 703(j) (see H.R. No. 914, 1964 U.S. Code Cong. & Admin. News, pp. 2391, 2401-2409). The bill received heated opposition, its opponents expressing the fear that it would impose on unions and employers a federally administered racial quota system. (See generally, EEOC, Legislative History of Titles VII and ~~XI,~~ Civil Rights Act of 1964.) When the bill reached the Senate, Senators Clark and Case, its floor managers, filed a report declaring: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. [¶] [The employer] would not be obliged—indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. . . ." (Interpretive Memorandum on Title VII of H.R. No. 7152, submitted jointly by Senators Clark and Case, floor managers, 110 Cong. Rec. 7213, Apr. 8, 1964; EEOC Legislative History, *supra,* p. 3043.)

In response to the objections of opponents, Senator Clark filed a series of responses to these objections, among them the following:

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory." (EEOC, Legislative History, *supra,* p. 3015.)

A series of amendments, the so-called Dirksen-Mansfield substitute, was then framed by supporters of the bill. In order to allay fears of racial preference hiring, the present text of section 703(j) was added to the bill. One of its draftsmen, Senator Humphrey, explained its purpose: "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." (Remarks of Senator Humphrey, 110 Cong. Rec. 12723, June 4, 1964; EEOC Legislative History, *supra,* p. 3005.)

The Dirksen-Mansfield substitute was adopted by both Senate and House.

As we have observed, a straightforward reading of section 703(a) reveals a prohibition against racial, ethnic and gender qualifications in employment; a similar reading of section 703(j) conveys awareness that this prohi-

bition is not to be shunted aside for the sake of an existing imbalance, however caused. The legislative history reveals complete harmony between congressional language and congressional intent. The assumption that Congress intended to permit employers to pursue minority preference hiring to correct an imbalance rests upon a misreading of the statute and a disregard of congressional intent.

V

What is required by title VII is "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (*Griggs v. Duke Power Co., supra,* 401 U.S. at p. 431 [28 L.Ed.2d at p. 164].) The action of the Sacramento County Civil Service Commission oversteps that objective and establishes a barrier to the employment of majority applicants which violates that objective. It violates the competitive qualification and anti-discrimination provisions of the county charter as well. The order for a peremptory writ directing its abrogation was correct.

Judgment affirmed.

Puglia, P. J., and Janes, J., concurred.

In the Superior Court
of the
State of California
in and for the County of Sacramento
No. 257623 Dept. 9

John M. Price, as District Attorney for the County of Sacramento,

Petitioner,

vs.

The Sacramento County Civil Service Commission, and The County Board of Supervisors,

Respondents.

Notice of Intended Decision
[Rule 232]
[Filed August 2, 1976]

The two issues for the Court's decision appear to be:

1. Can this action be properly brought by the District Attorney, and it has been previously determined that these proceedings are properly brought by the District Attorney.

2. Is the procedure for introducing members of minority groups into the District Attorney's staff in accordance with constitutional requirements.

Whether or not Rule 7.10 will interfere with the exercise of judgment by the District Attorney the efficient operation of the District Attorneys in selection of personnel and thus

affecting the District Attorney's office is not the question here. Neither is the question as to whether or not all persons who are members of the State Bar are equally qualified for such employment, or are we concerned with the means by which the best qualified may be secured.

The question is whether or not the application of Rule 7.10 results in discrimination.

Under Civil Service regulations, eligible lists based on supposed competence of applicants for jobs are set up, and choices are supposed to be made from the top three. In order that members of the so-called minority groups may be employed, if there are none in the top three, the hiring agent is required to go down the list until a member of such minority is found and such member must be appointed —with no particular consideration being given as to qualifications.

The District Attorney and the Civil Service Commission have different views concerning the advantage of this system. It was the District Attorney's opinion that it would lead to a lowering of quality of the District Attorney's staff. The Civil Service Commission felt it would be a help to the District Attorney in that the District Attorney would be assisted in securing members of the minority groups as members of his staff.

It is an interesting aspect of the percentages set up by the Civil Service Commission that the percentage of representation which should be employed was as the ratio of the minority to the general population, not the ratio of minority attorney to the number of attorneys in the community.

In dealing with the female representation, the Civil Service Commission chose 20%, whereas, it is the opinion of this writer that females make up more than 20% of the general population, if in fact they are a minority.

Generally it is the burden of the person discriminated against, to bring a proceeding to determine that fact. Here, however, the enactment or rule itself prescribes a discriminatory practice. The Court is therefore of the opinion that these proceedings are proper.

The regulation 7.10 is necessarily discriminatory in its operation.

The Petition for a Writ of Prohibition is granted.

Dated: August 2, 1976

/s/ VERNON STOLL
Judge of the Superior Court

In the Superior Court
of the
State of California
in and for the County of Sacramento
No. 257623

John M. Price, as District Attorney for the County of Sacramento,
Petitioner,
vs.
The Sacramento County Civil Service Commission, and The County Board of Supervisors,
Respondents.

[Filed September 16, 1976]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter came for hearing before this Court on March 24, 1976. The Petitioner, John M. Price, District Attorney, was represented by Vincent W. Reagor and Arjuna T. Saraydarian, Deputy District Attorneys, and the Respondents were represented by John B. Heinrich, County Counsel, and Thomas A. Darling, Supervising Deputy County Counsel. Having reviewed the entire pleadings, exhibits, records and other documents submitted to the Court and having heard all oral arguments, and being advised of all the premises, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Under Civil Service regulations, eligible lists based on supposed competence of applicants for jobs are set up, and choices are supposed to be made from those who attain the three top ranks.

2. The Civil Service Commission, with the encouragement of the Board of Supervisors, implemented Rule 7-10 of the Civil Service Rules, which required that the Petitioner hire one minority regardless of his position on the list, for every two non-minorities hired off the list.

CONCLUSIONS OF LAW

1. The proceedings are properly brought by the District Attorney as Petitioner directly affected by the imposition of *Rule 7.10.*

2. Since Respondent Commission Rule 7.10 cannot be utilized to hire an ethnic minority person without discriminating against a non-minority person who is equally eligible for county employment, Rule 7.10 is unconstitutional on its face as a matter of law. It is therefore unnecessary to consider whether the Respondent Commission's findings are supported by evidence.

Judgment should be entered ordering a peremptory writ of mandate/prohibition to issue from this Court ordering Respondents to cease and desist from implementing and enforcing Rule 7.10 against Petitioner.

Let the Judgment be entered accordingly.

Dated: September 15, 1976.

/s/ Vernon Stoll.
Judge of the Superior Court.

Appendix B

Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2 (a)

§ 2000e-2. Unlawful employment practices—Employer practices

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 § 2000e-2 (b)

§ 2000e-2

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2 (j)

§ 2000e-2

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to,

or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. 2000e-5 (g)

§ 2000e-5.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Sacramento County Civil Service Rule 7.10

7.10 Minority Preference Appointment

(a) The purpose of this rule is to provide a procedure for adjustment of disproportionate representation of minority personnel in the County work force which is a result of discriminatory employment practices.

(b) As used in this rule:

(1) "Minority personnel" includes, but is not necessarily limited to Blacks, Indians, Mexican-Americans, Spanish-Americans, Orientals, other non-Whites and women.

(2) Discriminatory employment practice means the use by the County of selection methods or selection criteria not related to the job.

(3) "Alternating ratio" means a ratio indicating a number of minority persons who shall be appointed to a classification for a given number of non-minority persons appointed to the classification. (Reference also: Resolution number 74-1)

(c) The findings by this rule shall be made separately in relation to each classification after a public hearing at which interested persons are afforded an opportunity to be heard and to present evidence. The Commission may order minority appointment preference as provided in this rule if it finds that:

(1) The number of minority personnel in a classification is disproportionately low in relation to the population mix of the County of Sacramento, including the population of all cities:

(2) The disproportionate representation was caused by discriminatory employment practices; and

(3) It is feasible to adjust the disproportionate representation by requiring that minority persons on an eligible list be appointed on a preferential basis as provided in this rule.

(d) If the Commission makes the findings required by this rule, it may order that minority personnel shall be appointed to the classification involved in accordance with an alternating ratio until a specified number of minority persons have been appointed to the classification. The Commission's order shall specify:

(1) The minority group or groups included in the order;

(2) The total number of such appointments, which number shall not be greater than necessarily to attain a fair approximation of minority representation in the classification consistent with the population mix in the County of Sacramento, including the populations of all cities.

(3) The alternating ratio to be used, taking into consideration the population mix of the County, the number of minority persons who can be reasonably expected to apply and qualify, and any other relevant circumstances; and

(4) Any other requirements which the Commission determines are reasonably necessary to assure effective compliance with the order in accordance with the purposes of this rule.

(e) If the classification is used by more than one department, the order shall also specify the number of minority appointments to be made by each department using the classification. The number for each department may be zero or greater and shall be determined by the Commission for each department on the

basis of any relevant considerations including, but not limited to, the number of positions in the classification in the department and the extent to which a representative minority mix already exists in said positions.

(f) An order may be rescinded or revised from time to time by the Commission as it determines to be necessary or appropriate. Such action may be taken by the Commission on its own motion or at the request of any interested person. In determining whether to rescind or revise an order, the Commission may consider any relevant information including but not limited to the needs of the service, changed circumstances, problems encountered in implementing the order, and information which was not previously considered by the Commission.

(g) The Director of Personnel Management shall certify for appointment minority persons from the eligible list for a classification for which the Commission has ordered use of an alternating ratio ahead of non-minority persons only when necessary to implement the requirements of the other. If a department required to appoint in accordance with an alternating ratio has not yet made the maximum number of non-minority appointments permitted by the applicable alternating ratio, persons shall be certified for appointment to a vacancy in the classification in the order of their standing on the list. If the department has made the maximum number of non-minority appointments permitted by the ratio, names of minority persons only shall be certified in the order of their standing on the list and the appointment shall be made from among the minority persons whose scores at the time of certification represent the three highest ranks and who are available for appointment. (Revised October 3, 1974)

Appendix C

Findings and Order of
Sacramento Civil Service Commission.

Before the
Civil Service Commission
County of Sacramento
State of California

In the matter of the implementation of Civil Service Commission Rule 7.10 in the classes of Attorney I and II

FINDINGS

I

After being duly noticed as required by Commission Rule 7.10, this matter was heard by the Civil Service Commission on July 24, 1975, and on August 21, 1975.

II

The matter to be determined by the Commission was whether the minority preferential hiring provisions of said Rule 7.10 should be implemented in the classes of Attorney I and Attorney II.

III

The classes of Attorney I and Attorney II are used by the office of the County Counsel, the District Attorney and the Public Defender.

IV

In accordance with Commission Resolution No. 74-1 the Commission has heretofore implemented Rule 7.10 only for minorities other than women. Necessary studies and employment and affirmative action needs for employment of women are not yet complete. Accordingly, the order of the Commission shall be limited to minorities other than women.

V

Minorities are underrepresented in the office of the County Counsel in the attorney classes. However, the provisions of said Commission Resolution No. 74-1 provide for a minimum standard of feasibility for the implementation of Rule 7.10 that there be sufficient turnover to allow for at least three vacancies per year. Vacancies in the attorney classes in said office occur at a rate of less than three per year. It is therefore not feasible to implement Rule 7.10 in the County Counsel's office.

VI

Minorities in the attorney classes in the office of the Public Defender have increased sufficiently recently so that the percentage of minorities in said office are substantially near the percentage of minorities in the Sacramento area. Accordingly, it is unnecessary to implement Rule 7.10 for the attorney classes in the office of the Public Defender.

VII

Of approximately 65 positions in the attorney classes in the office of the District Attorney, only 1 is filled by a person who is a member of a minority group. Minorities

are substantially underrepresented in said classes in relation to the percentage of minorities in the Sacramento area which is approximately 19.5%.

VIII

There is no evidence that said underrepresentation of minorities is a result of intentionally discriminatory employment practices by the County of Sacramento in general or by the office of the District Attorney in particular. There is evidence indicating, and the Commission so finds, that said underrepresentation is a result of unintentionally discriminatory employment practices on the part of the County and the District Attorney's office including, but not necessarily limited to, the discriminatory practices set forth below.

IX

Until recent years, Sacramento County's civil service system has been typical of the traditional civil service systems of most governmental employers throughout the United States in that the County's civil service system has tended to encourage the employment of non-minorities and discourage minorities from obtaining or seeking county employment. The underrepresentation of minorities in the attorney classes in the District Attorney's office has in part been caused by the said discriminatory effect of Sacramento County's traditional civil service system.

X

The oral only examinations for the class of Attorney I, including the most recent examination, have never been validated in accordance with legally accepted validation

standards. In the most recent Attorney I examination, some minority candidates placed high enough on the eligible list for appointment but those appointable minority candidates who were offered appointment in the District Attorney's office decided to accept appointments in the office of the Public Defender. The other appointable minority candidates on said list were not offered appointment in the District Attorney's office. All other minorities on said eligible list were too far down on the list to be considered for appointment. Said Attorney I examination, being unvalidated and having adversely affected minority candidates, constitutes a discriminatory employment practice.

XI

The evidence indicates and the Commission so finds that prior to December 1974, there was no special effort to recruit minority persons for appointment in the Attorney I class in the District Attorney's office. The evidence indicates, and the Commission so finds, that recruitment for Attorney I examinations since that time have not included sufficient special efforts to assure potential minority candidates that they are wanted and that their prospects for appointment in the District Attorney's office are at least as good as the prospects for non-minority candidates. The insufficiency of such special recruitment efforts, particularly in the context of Sacramento County's reputation as having a traditional civil service system, constitutes a discriminatory employment practice which is in part responsible for the underrepresentation of minorities in the attorney classes in the District Attorney's office.

XII

While the District Attorney's office has employed a substantial number of minority persons in legal trainee positions as Student Interns and Legal Research Assistants, to date, the only persons who have formerly served as such trainees who have progressed to appointment in said office in the class of Attorney I are non-minorities. The only such former trainee who was a minority person on the eligible list referred to in Finding X above was not offered an appointment by the District Attorney's office. The Student Intern and Legal Research Assistant classes are especially well suited for the recruitment, training and retention of prospective attorneys in numbers which include a representative proportion of minority persons. The use by the District Attorney's office of said trainee classes has nevertheless resulted only in non-minorities, and constitutes a discriminatory employment practice which is in part responsible for the underrepresentation of minorities in the attorney classes in the District Attorney's office.

XIII

At previous meetings, on June 27, 1974, July 25, 1974, and December 5, 1974, the Commission has decided not to implement Rule 7.10 in the District Attorney's office. Said decisions were reached in each instance after said office had assured the Commission that the District Attorney's office could and would make substantial progress in the employment of minority attorneys without use of Rule 7.10. There has nevertheless been no increase in the number of minority attorneys employed by said office.

XIV

It is feasible for governmental legal offices to recruit and hire minority attorneys in representative numbers. Examples include, but are not necessarily limited to, the entry level class of Legal Counsel in California State Government in which 17% are minorities and the representative number of minority attorneys which have been hired by the Sacramento County Public Defender. From the success of other governmental employers of attorneys in hiring minorities it may be inferred, and the Commission so finds, that the underrepresentation of minorities in the attorney classes in the District Attorney's office has in substantial part been caused by discriminatory employment practices.

XV

There is a vital need for minority attorneys in the office of the District Attorney as a key element in Sacramento County's system of law enforcement and criminal justice. The underrepresentation of minority attorneys in said office has continued already far too long. It is probable, and the Commission so finds, that there will be no significant increase in the number of minority attorneys in said office without the assistance of Rule 7.10.

XVI

The Commission has heretofore implemented Rule 7.10 only for appointment to entry level classes. Virtually all appointments to attorney positions in the District Attorney's office are initially made in the class of Attorney I.

Accordingly, Rule 7.10 should not be considered for Attorney II to which virtually all appointments are promotional.

XVII

The Attorney I eligible list established by Sacramento County in January 1975 contains 12.7% minority attorney representation. It is therefore probable, and the Commission so finds, that at least 12.7% of the attorneys available for employment in the Sacramento area are minorities. It is feasible to utilize Rule 7.10 to hire minority attorneys so that the percentage in the District Attorney's office equals at least 8% or approximately 70% of parity with the percentage of available attorneys who are minority members.

XVIII

In summary, minorities are underrepresented in the attorney classes in the District Attorney's office, such underrepresentation was caused by unintentional discriminatory employment practices, and it is feasible to implement an alternating ratio pursuant to Rule 7.10 for appointment to the class of Attorney I in said office until the percentage of minority attorneys in the classes of Attorney I and Attorney II is 8%.

XIX

In implementing Rule 7.10, it is the intent and purpose of the Commission to adjust for the adverse effect on minorities of past discriminatory employment practices on the basis of substantially the same considerations and decisional law as would be applicable in court in a civil rights action seeking injunctive relief in cases in which there is

no evidence of intentional discrimination. In this regard, the Commission has applied the presumption applied by the courts in such cases that when there is a significant underrepresentation of minorities in a group of employees, the underrepresentation is presumed to have been caused by discriminatory employment practices unless the employer can carry the burden of showing that the employer's selection procedures are job-related. The Commission has found that the examinations for Attorney I in the District Attorney's office have not been validated and that no other aspects of the selection procedure for said class have been validated. Accordingly, the Commission's order herein is based on the presumption which arises because of the lack of such validation together with the findings of other unintentionally discriminatory employment practices as set forth above.

ORDER

1. Appointments in the class of Attorney I in the District Attorney's office shall be made on the basis of an alternating ratio of 2:1 so that at least one minority person is appointed for every two non-minority persons.

2. Said ratio shall be applied only until the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%.

3. Any minority group which is represented in all attorney classes in the District Attorney's office by a percentage which equals or exceeds 8% of the representation of that minority group in the classes of Attorney I and II in the District Attorney's office shall not be eligible for preferential appointment.

4. As provided in Rule 7.10, the Commission retains jurisdiction to modify this Order as it determines to be necessary based on changed circumstances, new information or for any other appropriate reason.

Adopted as the Findings and Order of the Civil Service Commission on the 25th day of September, 1975.

/s/ ARNOLD MARTINEZ, JR.
Chairperson, Civil Service
Commission of the County of
Sacramento

Supreme Court, U. S.
FILED
AUG 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1996

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO,
Petitioner

vs.

THE SACRAMENTO COUNTY CIVIL SERVICE COMMISSION, and
THE SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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VS.

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I

PRELIMINARY STATEMENT

A. The Instant Petition for Writ of Certiorari Seeks Review of a Decision of the California Supreme Court Which Holds That a Governmental Entity May Voluntarily Adopt a Race Conscious, Affirmative Action Hiring Program of Limited Duration to Alleviate an Underrepresentation of Minority Employees Which the Entity Finds Is Attributable to Its Own Past Discriminatory Employment Practices

The instant petition arises out of a mandamus proceeding which was filed in 1975 by the Sacramento County District Attorney against the Sacramento County Civil Service Commission. The District Attorney's action was filed because the Sacramento County Civil Service Commission had

issued an order pursuant to Commission Rule 7.10, titled "Minority Preference Appointment". Commission Rule 7.10 is quoted in full in the decision of the California Supreme Court (26 Cal.3d 263-264).

The Commission's order would have required that appointments in the class of Attorney I in the District Attorney's office be made ". . . on the basis of an alternating ratio of 2:1 so that at least one minority person is appointed for every two non-minority persons . . ." and that said ratio ". . . be applied *only* until the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%." (26 Cal.3d 266, emphasis added)

The actual impact of the Commission's order would have been extremely nominal. At the time of issuance of the order there were 65 attorneys on the District Attorney's legal staff, 34 of whom were in the Attorney I and Attorney II classifications. The 8% goal specified in the order would have been met by the employment of three minority attorneys (8% of 34 = 2.72). Thus, even if the only minority attorney already employed in the District Attorney's office had been appointed to Attorney III, the Commission's order would have required only that three of the next nine attorneys hired by the District Attorney be qualified minorities. (26 Cal.3d 266, fn. 4)

The District Attorney's action presented two basic issues to the trial court:

(1) the validity of Commission Rule 7.10 on its face; and

(2) the adequacy of the evidence as a basis for the Commission's order pursuant to Rule 7.10.

The trial court disposed of the case based solely on a determination that Rule 7.10 was unconstitutional on its face, without considering the question of whether the evidence was adequate as a basis for the Commission's order (26 Cal.3d 267)

On appeal, as indicated in the petition, the California Third District Court of Appeal affirmed the trial court's ruling. Like the trial court decision, the decision of the California Third District Court of Appeal turned solely on the question of the validity of Commission Rule 7.10 and did not purport in any way to consider the adequacy of the Commission's hearing and the evidence presented to the Commission as a basis for the Commission's order (petition pp. A-68 to A-85). It should be noted, however, that the decision of the California Third District Court of Appeal does not constitute a part of California decisional law because it was entirely nullified and vacated when the California Supreme Court granted the respondents' petition for a hearing. This point is discussed in more detail below.

In reversing the decision of the trial court, the California Supreme Court also considered only the question of the validity of Commission Rule 7.10. The California Supreme Court decision does not in any way purport to consider the adequacy of the evidence which was the basis for the Commission's order. It is for this reason that the California Supreme Court remanded the case to the trial court for further proceedings (26 Cal.3d 285-286).

Much of the instant petition is devoted to contentions that have nothing to do with the validity of Rule 7.10. In addition to premature contentions regarding the procedures followed by the Commission and regarding the adequacy of the evidence, the petition contains a considerable amount of other "background" information which is not supported by anything in the record and is, in many instances, either misleading or just plain factually inaccurate.

At page 2 of the petition, there is a reference to the opinion of the Court of Appeal for the State of California, Third District, and the citation "77 Cal.App.3d 234, 143 Cal.Rptr. 483". A copy of the referenced Court of Appeal opinion accompanies the petition starting at page A-68 as

Appendix B. This reference erroneously implies that there is in existence under California law an appellate decision in this case other than the one issued by the California Supreme Court. Contrary to this implication, as a result of the granting of a hearing by the California Supreme Court, the decision of the Court of Appeal, Third District, was entirely and completely vacated and nullified. *People v. Rogers* (1978) 21 Cal.3d 542, 547, *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 74, fn. 2, and Cal. Rules of Court, Rule 976(d). It is impossible to find the cited case in the California Official Reports because it has been deleted from the bound volume of 77 Cal.App.3d.

Where the California Supreme Court has granted a hearing in a case which has been decided by the California Court of Appeal, without some further *express act* of approval or adoption of the Court of Appeal's opinion by the California Supreme Court, the Court of Appeal's opinion and decision are of no effect whatsoever as a judgment, or as a precedent to be followed, in the decision of legal questions that may thereafter arise. *It is just as if the Court of Appeal's opinion and decision had not been written. Knouse v. Nimocks* (1937) 8 Cal.2d 482, 483-484.

Thus, under California law, the only California appellate court decision extant in relation to the instant case is the one filed by the California Supreme Court on January 25, 1980, in *Price v. Civil Service Commission* and reported in the California Official Reports at 26 Cal.3d 257. The California Court of Appeal's opinion and decision in the instant case have been entirely superseded by the opinion and decision of the California Supreme Court. The Court of Appeal's decision no longer exists as a matter of law and its citation for any purpose is improper. *Coalition for L. A. County Planning, etc., Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 250, fn. 9.

Another misleading aspect of the petition for certiorari is the petitioner's use of the word "involuntary" with reference to the affirmative action hiring program provided for by Commission Rule 7.10 (petition pp. 2 and 3). The fact is that implementation of a minority hiring program under Rule 7.10 does constitute *voluntary* action by the County of Sacramento for the purpose of remedying the effects of past discriminatory employment practices. In a comprehensive sense, an order by the Commission pursuant to Rule 7.10 represents *voluntary action by the County* to achieve the objectives of Title VII of the Civil Rights Act of 1964 by providing equality of employment opportunities and removing barriers that have operated in the past to favor an identifiable group of white employees over other employees.

Rule 7.10 provides a vehicle for the Civil Service Commission to exercise its responsibilities to take such action as the charter designated administrator of the County's personnel system. For the purposes of Title VII of the Civil Rights Act of 1964 and Commission Rule 7.10, the County of Sacramento constitutes but a single employer. This is so, irrespective of the fact that an employer, like the County of Sacramento, is sub-divided for organizational purposes into various departments or other subunits.

As stated by the California Supreme Court, the affirmative action plan at issue was *voluntarily* adopted by the County of Sacramento, since the plan was implemented by the Commission (the County department which the charter invests with authority over procedures for selection of civil service employees) without any compulsion by federal or state authorities.

> "The fact that a head of one of the constituent departments of the County employer, i.e., the District Attorney, disagreed with the adoption of such a plan does not, of course, render the plan 'involuntary' any more

> than the disagreement of one of a private employer's foremen or department heads would render a plan adopted by the responsible official of such an employer involuntary." (26 Cal.3d 257, 270-271, fn. 9)

Particularly perplexing are the petitioner's references to the fact that the District Attorney is "an official elected by the citizens of his community" while the members of the Civil Service Commission "have not been elected by the people" (petition p. 13). The preceding quoted references, together with a statement that appears later in the petition characterizing the Commission as "a non-elected group of five persons with no special qualifications" (petition p. 23) are apparently intended to imply that an elected officer is somehow better qualified to discharge the duties and responsibilities of his office than an appointed officer. The petitioner, of course, cannot cite any authority for such a proposition.

It must be conceded that selection of a public official by an appointment process provides no guarantee that the person appointed will be "qualified" for the performance of the duties and responsibilities of the office. However, this is just as true of the use of the election process for selection of public officials as it is of the appointment process. The fact is that Sacramento County has been extremely fortunate in that for many years the persons appointed as members of the Civil Service Commission have been carefully selected and are extremely well qualified, by virtue of their experience or training, or both, for the performance of their duties and responsibilities as members of the Commission.

As has been previously noted, much of the petition is devoted to discussion of the petitioner's views regarding the propriety of the Commission's procedures and the adequacy of the evidence as a basis for the Commission's order which would have implemented Rule 7.10 in the Dis-

trict Attorney's office. As also previously noted, all of the discussion along this line is inappropriate because of the fact that the decision of the California Supreme Court related solely to the validity of Rule 7.10 and did not in any way purport to deal with questions regarding the Commission's procedures or the evidence. Even though such discussion is not relevant to the question of the validity of Rule 7.10, such discussion includes comments in addition to those discussed above which are misleading and which warrant at least minimal response in this brief. For example, the petitioner refers to the Commission's hearings as "non-adversary" and complains that there were "no procedural safeguards . . . was no requirement for sworn testimony, for the examination of witnesses, for the application of basic rules of evidence, for the recordation of hearings, or for review on appeal" (petition pp. 8 and 23).

Such comments relate solely to questions which are not ripe for review by this Court because they have not been considered by any California court. See *Clay v. Sun Ins. Office, Ltd.* (1960) 363 U.S. 207, 211-212. For example, it is entirely conceivable that under California law, the function of the Civil Service Commission in implementing Rule 7.10 is quasi-legislative, as distinguished from quasi-judicial, and that technical evidentiary and procedural rules are therefore not applicable to the Commission's proceedings under Rule 7.10. Insofar as application of Rule 7.10 to the District Attorney's office is concerned, there are many legal issues which should be considered by the California courts before they will be ripe for consideration by this Court (*Clay v. Sun Ins. Office, Ltd., supra*).

It should also be noted that the District Attorney's office was represented at all times by members of that office during the course of the Commission's proceedings under Rule 7.10. While the District Attorney's representatives did disagree with the Commission's view regarding the signifi-

cance of the evidence considered by the Commission, the District Attorney's representatives did not at any time complain that they were not afforded a full opportunity to present evidence on their own behalf or to examine witnesses. The District Attorney's representatives also did not at any time assert that the Commission's hearing should have been conducted in accordance with the technical procedural and evidentiary rules applicable in court trials.

At pages 12 and 13 of the petition, the District Attorney characterizes the effect of the California Supreme Court's decision in the instant case as "enormous" because it "mandates" the government "to blatantly discriminate, in public employment, against its citizens". This statement, like others in the petition, is extremely misleading. The decision of the California Supreme Court mandates nothing. As is discussed in more detail elsewhere in this brief, the California Supreme Court's decision does no more than uphold Rule 7.10 on its face as a legally sufficient basis for an order by the Civil Service Commission, issued after a hearing on the basis of *evidence which meets the requirements of Rule 7.10.*

The opinion and decision of the California Supreme Court does not mandate application of Rule 7.10 with respect to the District Attorney's office or with respect to any other County office or department. On the contrary, it is clear that the question of whether Rule 7.10 was properly implemented with respect to the District Attorney's office on the basis of sufficient evidence is a question which has not yet been determined by any California court. It is for this reason that the California Supreme Court expressly remanded the case back to the trial court for a determination of whether the evidence before the Commission was adequate as a basis for implementation of Rule 7.10 in the District Attorney's office as provided in the Commission's order of September 25, 1975 (see 26 Cal.3d 257, 285-286).

At two points in the petition, without any indication or explanation of its intended significance, the petitioner refers to the fact that the decision of the California Supreme Court in the instant case was "a four to three decision" (petition pp. 4 and 12). The apparent purpose of referring to this fact is to indicate that the decision of the California Supreme Court is somehow defective or entitled to less weight than would be the case if the decision was unanimous. As is the case with decisions of other state courts, as well as decisions of the United States Supreme Court, under California law a decision of the California Supreme Court concurred in by a majority of the judges of the court is binding as a precedent. A dissenting opinion of the California Supreme Court has no function except to express the dissenter's private view (*Athearn v. Nicol* (1921) 187 Cal. 86, 93 and *Wall v. Sonora Union High School District* (1966) 240 Cal.App.2d 870, 872).

Of far greater importance is the content of the opinion and decision of the California Supreme Court. It is comprehensive and well reasoned. It thoroughly discusses and refutes each and every one of the District Attorney's contentions regarding the validity of Rule 7.10.

II

ISSUES

A. The issues presented by the petition are:

1. Whether the controversy between the parties has become moot during the pendency of this litigation;

2. Whether the Sacramento County District Attorney has standing to challenge the validity of Commission Rule 7.10 in the United States Supreme Court;

3. Whether Rule 7.10 of the Sacramento County Civil Service Commission is valid.

B. The issue of whether the Commission's order pursuant to Rule 7.10 in the instant case was supported by adequate evidence is not properly before this Court because that issue has not yet been considered by the California courts.

III

REASONS FOR NOT GRANTING THE WRIT

A. The Controversy Between the Parties Has Become Moot During the Pendency of This Litigation Because the Number of Minority Attorneys Employed by the District Attorney Has Exceeded the Number Which Would Have Been Required by the Commission's Order Under Rule 7.10 and the Commission Has Vacated the Order of Which the District Attorney Complains

The order of the Sacramento County Civil Service Commission which prompted the District Attorney to initiate proceedings in the trial court was issued by the Commission on September 25, 1975. The decision of the California Supreme Court upholding Rule 7.10 and remanding the case to the trial court became final on March 20, 1980, upon denial of the District Attorney's petition for rehearing.

During the four and one-half year period while the litigation was pending, because of the action filed by the District Attorney, the Commission's order of September 25, 1975, was not at any time implemented and Commission Rule 7.10 was not in any way utilized or applied as a basis for appointment to any attorney position in the District Attorney's office. Nevertheless, as a result of the appointments made by the District Attorney's office while the instant litigation was pending, without any use of an alternating ratio as a basis for attorney appointments pursuant to Commission Rule 7.10 and without any implementation of the Commission's order of September 25, 1975, the 8% goal specified in the Commission's order was reached. The 8% goal was actually substantially exceeded.

The high point in the percentage of minority attorneys in the District Attorney's office was reached on or about March 22, 1978, when the number of minority attorneys at the Attorney I level equaled 50% and the number of minority attorneys at the Attorney II level equaled 11.76%, resulting in a combined percentage of minority attorneys at the Attorney I and Attorney II levels of 21.7%. The foregoing information was gathered by the County's Department of Personnel Management and summarized in a report dated April 3, 1980 (see Appendix to this brief).

Accordingly, on April 24, 1980, prior to the filing of the instant petition for certiorari, the Commission issued a new order which entirely rescinded the Commission's order of September 25, 1975, and which expressly provides that the Commission's order of September 25, 1975, ". . . shall not be implemented nor be of any effect for any purpose whatsoever." The facts regarding the Commission's action in rescinding its order of September 25, 1975, are stated in detail in the Commission's order of April 24, 1980, the full text of which is set forth as Appendix A hereto.

A case becomes moot when it can be said with assurance that there is no reasonable expectation that the alleged violation of a party's rights will recur and interim events have completely and irrevocably eradicated the effects of the alleged violation. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack* (1969) 395 U.S. 486, 496 and *County of Los Angeles v. Davis* (1979) 440 U.S. 625, 631.

In summary, the Commission's order of September 25, 1975, was never in any way implemented. During the pendency of this litigation the number of minority attorneys in the District Attorney's office reached a level which substantially exceeded the 8% goal specified in the Commis-

sion's 1975 order. As a result, on April 24, 1980, the Commission formally recognized that its order of September 25, 1975, could no longer serve any purpose nor be of any effect and entirely rescinded the earlier order, expressly providing that the order of September 25, 1975, would not be of any effect "for any purpose whatsoever". (Appendix) The rules for determining mootness, as enunciated in the *Powell* and *Davis* cases, *supra,* are applicable here. The alleged violation (i.e., the Commission's order of September 25, 1975) has not had any effect whatsoever on the District Attorney's office. Any potential for effect which the order *might* have had has been entirely eradicated by subsequent events (i.e., the attainment through normal hiring practices of the percentage of minority attorneys specified in the Commission's order and the Commission's action on April 24, 1980, formally rescinding the earlier order). As a result of these substantial changes in the circumstances, there is simply no current basis for any expectation that the alleged violation will recur and this case has therefore become moot.

B. The District Attorney Does Not Have Standing to Challenge the Validity of Commission Rule 7.10 in the United States Supreme Court

As discussed above under Part IIIA, prior to the filing of the instant petition for certiorari in this court, the Civil Service Commission rescinded its order of September 25, 1975, because of the fact that the percentage of minority attorneys in the District Attorney's office had not only reached the 8% goal specified in the order, the percentage had in fact substantially exceeded that goal. It is clear that this increase in the percentage of minority attorneys in the District Attorney's office was achieved as a result of normal hiring practices and was not in any way a result of or an effect of the Commission's order of September 25, 1975, pursuant to Rule 7.10.

All the District Attorney can argue in support of the petition for certiorari at this time is that the Commission *might* at some time in the future attempt to again implement the provisions of Commission Rule 7.10 in some manner in the District Attorney's office. Such an argument is speculative and hypothetical. It is inadequate as a basis for review of the validity of Commission Rule 7.10 by the United States Supreme Court at this time.

It is established beyond peradventure that in order to have standing to challenge the validity of a statute, a party must have a ". . . personal, concrete, live interest in the controversy". See *Baker v. Carr* (1962) 369 U.S. 186, 204, and *Andrus v. Allard* (1979) ..... U.S. ....., 62 L.Ed.2d 210, 222.

A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the actual application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied in hypothetical situations. *Ulster County Court v. Allen* (1979) 442 U.S. 140, 155.

In the instant case, the possible effect of the alleged violation (i.e., the Commission's order of September 25, 1975) has been entirely eradicated by the Commission's action on April 24, 1980, rescinding the earlier order. The mere existence of Commission Rule 7.10 at this time in no way affects the District Attorney or the operations of his office. All that the District Attorney can do at this time, based on hypothetical examples and speculation, is argue that Rule 7.10 *might* be applied at some future time by the Commission in a manner which conflicts with the rights of the District Attorney or of other persons who are not parties to the instant litigation.

In summary, although the Commission originally intended that its order of September 25, 1975, would be ap-

plied in the District Attorney's office and would have an effect (albeit nominal) on the hiring of minority attorneys in that office, the order was never, at any time, actually applied and had no effect whatsoever on the District Attorney's office. While this litigation has been pending, normal hiring practices have resulted in a percentage of minority attorneys in the District Attorney's office which substantially exceeded the 8% goal specified in the Commission's order of September 25, 1975, and that order was entirely rescinded by the Commission on April 24, 1980, prior to the filing of the instant petition for certiorari in this court. At this time, any argument which the District Attorney might make in support of standing to question the validity of Commission Rule 7.10 depends entirely on hypothetical examples and speculation. Under the decisional law discussed above, this is inadequate as a basis for establishing standing on the part of the District Attorney at this time to assert the invalidity of Commission Rule 7.10.

C. Rule 7.10 Provides a Valid Procedure for Voluntary Action by Sacramento County to Remedy the Effect of Past Discriminatory Employment Practices

1. Rule 7.10 requires a finding of past discrimination sufficient to violate Title VII of the 1964 Civil Rights Act

Rule 7.10 requires the Civil Service Commission of Sacramento County to hold public hearings to collect evidence on discriminatory employment practices, and to make specific findings before ordering a remedy. The relevant necessary findings are: (1) that a particular County employment classification has a disproportionately low number of minority personnel in relation to County population; (2) that the disproportionate representation was caused by discriminatory employment practices. Rule 7.10(c)(1) and (2).

"Discriminatory employment practice" is defined as "selection methods or selection criteria not related to the job". Rule 7.10(b)(2). The petitioner asserts (p. 21) that this definition is too broad, encompassing practices which have no adverse impact on minorities. However, as the California Supreme Court noted, it is clear in the context of the rule as a whole that in its application "discriminatory employment practices" refers exclusively to practices which adversely affect minorities. 26 Cal.3d 257, 264, n. 2, and 282, n. 19.

When non-job related selection criteria result in a disproportionately low number of minority hirings, the employer is in violation of Title VII, whether or not the discrimination is intentional. *Griggs v. Duke Power Company* (1971) 401 U.S. 424, 431-432, interpreting 42 U.S.C. § 2000(e)-2(h); *Albemarle Paper Company v. Moody* (1975) 422 U.S. 405, 425. Thus, a finding under Rule 7.10 is precisely a finding that a County office is in violation of Title VII.[1]

Indeed, the Civil Service Commission asserted its focus on Title VII violations in its findings regarding the District Attorney when it stated:

> "In implementing rule 7.10, it is the intent and purpose of the Commission to adjust for the adverse effect on minorities of past discriminatory employment practices on the basis of substantially the same considerations and decisional law as would be applicable in court in a civil rights action seeking injunctive relief in cases in which there is no evidence of intentional discrimination." 26 Cal.3d at 282, n. 19.

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[1]See 26 Cal.3d at 262-265 for a history of Rule 7.10.

2. Where there is a finding of past discrimination in violation of Title VII, the race conscious remedy provided for by Rule 7.10 follows long-standing Supreme Court principles

The alternating appointment remedy is authorized by Rule 7.10 to correct for proven past discrimination. This race conscious remedy follows a principle laid down by this Court 15 years ago.

> "Where racial discrimination is concerned, 'The [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Company v. Moody, supra,* 422 U.S. 405, 418, quoting *Louisiana v. United States* (1965) 380, U.S. 145, 154.

This principle has been used to develop race conscious remedies in voting cases (*Louisiana v. United States, supra*), school desegregation cases (*Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 28 and companion cases), and employment cases (*Albemarle, supra; Franks v. Bowman Transp. Co., Inc.* (1975) 424 U.S. 747, 767-771; *United Steelworkers, etc. v. Weber* (1979) 443 U.S. 193; *see* discussion, *infra*).[2]

3. Under Weber, the race conscious remedy provided for by Rule 7.10 is consistent with Title VII

In *United Steelworkers v. Weber, supra,* this Court decided that *even without a finding of past discrimination,* a voluntary affirmative action plan may be consistent with § 6703(a) and (d) of Title VII of the 1964 Civil Rights Act. 42 U.S.C. § 2000(e)-2(a) and 2(d).

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[2]The petitioner's claim that only individual victims of employment discrimination are entitled to relief under Title VII is conclusively refuted by *Albemarle, supra,* and by *Weber, supra.*

Weber approved of the Kaiser Aluminum-United Steelworkers' plan to reserve 50% of the positions in a craft training program for black employees, in order to transform Kaiser's virtually all-white craft work force in its various plants to one reflecting the percentage of blacks in the local work forces generally. There was no finding in *Weber* of past discrimination by either Kaiser or USWA. Indeed, there was no investigation of Kaiser's employment practices by any authorized agency.[3] The instant case involves a voluntary (*see, infra*) plan to remedy specific past discrimination by the employer, following a finding by a government agency of past discriminatory employment practices. Given the Court's approval of Kaiser reservation of positions for black workers without a specific finding of past discrimination, *a fortiori*, Sacramento County's race conscious remedy for *proven discrimination* is consistent with Title VII.

In *Weber*, as here (petition p. 15), opponents of the plan cited § 703(j) of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)-2(j)) to argue that a race conscious plan violated Title VII because it involved preferential hiring. This Court, however, has rejected that argument, stating that § 703(j) does not prohibit such affirmative action plans, but merely makes it clear that such plans are not required by Title VII. 443 U.S. at 205-206.

This Court in *Weber* also dismissed the claim, resurrected by petitioner here (petition p. 16) that *McDonald v. Santa Fe Transportation Company* (1976) 427 U.S. 273, forbids race conscious affirmative action. While *McDonald* held that Title VII protects whites as well as blacks, and while some white persons may be adversely affected by the

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[3]The Court did take note of the racial imbalance in Kaiser's craft employee population, and of exclusion of blacks from craft unions generally. 443 U.S. at 198-100.

consequences of affirmative action, the *Weber* court stated that to use *McDonald* to interpret Title VII to forbid "all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected". 443 U.S. at 201-202.

4. Weber applies to public employers

Petitioner argues that *Weber* does not apply to the actions of the Sacramento County Civil Service Commission because the Commission is a public employer. While it is true that the Court in *Weber* narrowed its opinion to cover private employers, the purpose was to avoid any constitutional issue (443 U.S. at 200) and not to make a distinction for Title VII analysis. Moreover, this Court has stated clearly that there is no difference between private and public employers for Title VII purposes.

In *Dothard v. Rawlinson* (1977) 433 U.S. 321, the defendant Alabama Board of Corrections argued that more judicial deference is owed to a policy when it is established by state statute. The Court rejected this assertion.

> "The relevant legislative history of the 1972 amendments extending Title VII to the states as employers does not, however, support such a result. Instead, Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." 433 U.S. at 322, n. 14.

In addition, every circuit court which has considered this question has determined that private and public employers are treated alike under Title VII. (See cases cited by the California Supreme Court in opinion below, 26 Cal.3d at 273, n. 12.) Thus, *Weber* applies to Sacramento County as a public employer just as it applies to private employers.

5. While Rule 7.10 provides for a voluntary affirmative action program by the employer, even if it is characterized as involuntary, it is consistent with Title VII

Petitioner contends that a remedial race conscious hiring program under Rule 7.10 is involuntary and that *Weber* therefore does not apply because the Kaiser plan was voluntary. However, as noted earlier in this brief, the employer here is the County of Sacramento, not any particular office of the County. While the use of Rule 7.10 is obviously not supported by the County District Attorney's office, use of Rule 7.10 nevertheless involves voluntary action by the County agency which, under the County Charter, is responsible for the County civil service employment system. Rule 7.10 has not been imposed on the County by judicial or legislative action, but has been embraced by the County itself. Rule 7.10 is therefore a voluntary program agreed to by the employer, as was the program in *Weber.*

However, even if use of Rule 7.10 is characterized as involuntary, it is still consistent with Title VII. The hiring plan provided for in Rule 7.10 cannot be implemented in any County office unless there has first been a finding that the County has engaged in past acts of discrimination sufficient to constitute a violation of Title VII. A race conscious hiring program imposed by a court or other outside agency is a widely accepted remedy for violations of Title VII. See cases cited by the California Supreme Court at 26 Cal.3d 283, fns. 20 and 21.

6. The remedy provided by Rule 7.10 is permissible under Weber

While *Weber* did not establish explicit criteria for determining which voluntary affirmative action plans are permissible under Title VII, it did provide guidance for such

determinations in its explanation of why the plan at Kaiser was permissible. The Court's language makes it clear that two considerations were at work in approving the Kaiser plan. First, "[T]he purposes of the plan mirror[ed] those of the statute"; i.e., compatibility with the general objectives of Title VII. Second, a preferential hiring plan must not "unnecessarily trammel the interests of the white employees". The *Weber* plan met this second criterion because it did not require the discharge of whites, nor did it create an absolute bar to their promotion. Finally, it was temporary, intended to end when the racial imbalance was eliminated. 443 U.S. at 208-209.

These considerations are inherent in the operation of Rule 7.10. Since the rule "seeks to eliminate established patterns of racial segregation" in employment, it "clearly accords with the objectives of Title VII". Second, it operates no more harshly on non-minorities than the *Weber* plan. As in *Weber,* no non-minorities are to be discharged, there is no absolute bar to the hiring of non-minorities, and it is only a temporary remedy. 26 Cal.3d 275-276.

7. Application of Rule 7.10 does not violate the Equal Protection Clause of the Constitution

Petitioner argues that Rule 7.10 involves government action creating racial classifications which must be viewed under the "strict scrutiny" test of *Washington v. Davis* (1976) 426 U.S. 229, and earlier cases. Petitioner asserts that in this instance there is no showing of a compelling state interest, because there has been no showing of a constitutional or statutory violation by the petitioner. Moreover, the petitioner claims that this type of remedy is not necessary (petition pp. 18-22). However, as indicated *supra,* the sufficiency of the evidence or the findings is not at issue here. Further, the remedy here is of a type well-recognized by federal courts and this Court to respond to past discrimination.

This Court held a decade ago that the Constitution actually *compels* remedial race classifications to respond to certain instances of racial discrimination. *Swann, supra,* and companion cases. Since there is a compelling state interest in eliminating the consequences of past discrimination (*Louisiana v. United States, supra*), and since this often requires race-conscious remedies, such remedies are not violative of the equal protection clause.

This Court has recently established criteria for determining when race conscious remedies are appropriate. *University of California Regents v. Bakke* (1978) 438 U.S. 265; *Fullilove v. Klutznick* (1980) .... U.S. ...., 48 U.S. Law Week 4979. Both cases make it clear that such a remedy for proven past discrimination does not violate the Constitution.

In *Bakke,* Justice Powell distinguished the University admissions plan from cases in which there was a "determination by the legislature or a responsible administrative agency" that an employer had engaged in a discriminatory practice requiring remedial efforts (438 U.S. at 305). The concurring and dissenting opinion by Justices Brennan, White, Marshall and Blackmun also states that a race-conscious remedy would appropriately follow such a finding of past discrimination, meeting the strict scrutiny test (438 U.S. at 366, fn. 42). Thus, in *Bakke,* a majority of this Court endorsed race conscious remedies for proven past discrimination.

Whereas *Bakke* did not involve a finding of past discrimination, *Fullilove v. Klutznick, supra,* did. Justice Powell, in his concurring opinion, was therefore in a position to affirm a race conscious remedy on this basis. He articulated the prerequisites to a permissible race conscious remedy as:

> "First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. . . . Second,

the governmental body must make findings that demonstrate the existence of illegal discrimination." Powell, J., Concurring, (48 U.S. Law Week 4992-4993).

8. The application of Rule 7.10 requires findings by an agency authorized to make findings of past discrimination

Appropriate administrative agencies as well as legislatures and courts are authorized to make findings of past discrimination. See *Fullilove (supra)*, Powell, J., concurring, 48 U.S. Law Week 4993, and *Bakke (supra)* at 438 U.S. 307 and 366, fn. 42, Brennan, J., concurring. In *Lau v. Nichols* (1974) 414 U.S. 563, for example, the Court upheld a remedy ordered by the Department of Health, Education and Welfare, after the Department found the San Francisco school system to be in violation of Title VI of the Civil Rights Act. See also *United Jewish Organizations v. Carey* (1977) 430 U.S. 144; *McDaniel v. Barresi* (1971) 402 U.S. 39; *Contractors Assoc. of Eastern Pa. v. Sec'y of Labor* (3d Cir. 1971) 442 F.2d 159.

The Civil Service Commission of Sacramento County is the County agency designated by the Sacramento County Charter to oversee the civil service system of the County. As the policy making and monitoring agency of the County employer and based on specific County charter provisions, the Commission is the administrative agency with the responsibility to prevent discriminatory employment practices by any County office. See Sacramento County Charter provisions quoted at 26 Cal.3d 268-270, fns. 6, 7 and 8. The adoption of Rule 7.10 by the Commission to establish procedures for making findings regarding such practices and for the fashioning of remedies was therefore a logical and necessary step in the fulfillment of the Commission's duties. The adoption and use of Rule 7.10 is also in full accord with the preference for voluntary compliance with Title VII clearly expressed by Congress, the Equal Em-

ployment Opportunities Commission and this Court. See *Alexander v. Gardner-Denver Company* (1974) 415 U.S. 36, 44. See also the EEOC guidelines which strongly encourage voluntary remedial affirmative action, 29 C.F.R. § 1608. Such compliance is possible for Sacramento County as an employer only through the activities of the County's Civil Service Commission.

Given a finding of past discrimination by the Commission, as an authorized administrative agency, the race conscious remedy provided for by Rule 7.10 does not violate the equal protection clause. Such a remedy, specifically aimed at ameliorating the effects of the County's past discriminatory practices, not unduly harsh on non-minorities. and temporary in scope, surely fits within the grounds approved by five Justices of this Court in *Bakke* and by the Court in *Weber*.

9. Rule 7.10 does not require racially proportionate representation in any job classification

The District Attorney erroneously asserts that the true goal of Rule 7.10 is to create " . . . a racially proportionate allocation of public jobs . . ." (petition p. 13). This assertion is in obvious conflict with the provisions of the rule itself which provide, in subdivision (a), that the purpose of the rule is to provide a procedure for adjustment of disproportionate representation of minority personnel in the County work force *which is a result of discriminatory employment practices.* There is nothing in Rule 7.10 that purports to require racially proportionate representation. As expressly provided in subdivision (d)(2) of the rule, the total number of minority appointments " . . . *shall not be greater* than necessary to attain a fair approximation of minority representation in the classification consistent with the population mix in the County of Sacramento, including the populations of all cities." (Emphasis added)

It is apparent that Rule 7.10 does not require racially proportionate representation. Instead, the rule itself *prohibits* use of the rule to achieve anything greater than racially proportionate representation in a given job classification. After the Commission has held the hearing required by the rule and given consideration to all relevant factors, as required by the rule, it is entirely possible that the Commission will adopt a minority hiring order which falls far short of attempting to achieve racially proportionate representation. The order challenged by the District Attorney in the instant case is a good example. Although the order was never actually implemented *(supra)*, by its terms it would have been operative only until the District Attorney had hired two or three minority attorneys. At most, this would have resulted in approximately 8% minorities in the classes of Attorney I and II in petitioner's office—far less than the 19.5% minority population in Sacramento County generally.

The District Attorney's apparent fear that Rule 7.10 could be improperly applied to achieve "race proportionate representation" in the County work force provides no support for claiming that Rule 7.10 itself is invalid. The speculative possibility of discriminatory or other invalid administration of a statute or a rule is not a ground for holding it void. See *Estate of Monks* (1941) 48 C.A.2d 603, 614; *In re Culver* (1927) 84 C.A. 295, 297; and 16 Am.Jur.2d, *Constitutional Law*, Sec. 228.

10. Denial of certiorari is appropriate on the basis of actions by this Court in other relevant cases

The recent grant of certiorari in the case of *Minnick v. California Department of Corrections*, Docket No. 79-1213, does not support granting the petition here, because that case is significantly different in its essential points. In *Minnick*, there was no finding of past discrimination. The

major justification for the race conscious promotion and transfer plan was that race is a job-related factor in California prisons. In the present case, however, with a remedy explicitly for proven past discrimination, no such question is presented.

The instant case is in many ways very similar to *Lindsay v. City of Seattle* (1976) 86 Wn.2d 698, 548 P.2d 320; certiorari denied, 429 U.S. 886. In *Lindsay,* Washington's highest appellate court upheld Seattle's voluntary affirmative action program. Seattle's program required that a member of a racial minority group be appointed to one out of every three job vacancies to achieve minority group representation in city employment consistent with the population mix in the area. The Washington Supreme Court held that in discharging the city's obligation under the Civil Rights Act of 1964 the facts warranted the use of the minority employment preference to eradicate the effects of past discriminatory practices such as the use of unvalidated tests.

In addition to the use of unvalidated tests as evidence of past discrimination, the Washington court relied on statistics showing underrepresentation of minority employees as sufficient to establish a prima facie case of discrimination (*Lindsay v. City of Seattle, supra,* at 548 P.2d 325).

It is significant that the Seattle minority employment preference program was implemented *based only on statistics.* If statistics showed minority underrepresentation for any job, including promotional appointments, minorities were appointed on a preferential basis. Unlike the Seattle procedure, which was automatically implemented based on statistics, Rule 7.10 includes express safeguards to assure adequate notice, a public hearing and findings before a preference can be ordered. The Commission can order a preference only if the evidence establishes that the under-

representation was caused by past discriminatory practices *and* that it is feasible to adjust minority representation as provided in the rule.

Rule 7.10, with its specific procedural safeguards and evidentiary requirements, is therefore even more defensible than Seattle's automatically implemented procedure which was upheld in *Lindsay*. Certiorari should be denied in the instant case for the same reasons that the petition for writ of certiorari in the *Lindsay* case was denied by this Court (Docket No. 76-196, 429 U.S. 886).

CONCLUSION

For the reasons discussed above, this case has become moot and the District Attorney lacks standing to challenge the validity of Rule 7.10 in this Court. In any event, the California Supreme Court, based on a thorough and well reasoned opinion, correctly concluded that Rule 7.10 is valid in that it does no more than specify a procedure whereby Sacramento County, as an employer, may voluntarily adopt a race conscious hiring plan to remedy the effects of the County's own past discriminatory hiring practices. Since the California courts have not yet considered the question of whether the evidence was sufficient to support the Commission's order, that issue is not ripe for consideration by this Court. Denial of the petition is supported by, and would be consistent with, the decisions of this Court in other cases.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(Appendix follows)

APPENDIX A

To: Herb Jackson
District Attorney

From: John Canipe, Staff Analyst
Civil Service Commission

Subject: Civil Service Commission Rule 7.10

Attached is a copy of the Findings and Order rescinding the Commission's Findings and Order of September 25, 1975, as adopted by the Civil Service Commission at its meeting of April 24, 1980.

/s/ JOHN CANIPE
John Canipe, Staff Analyst
Civil Service Commission

JC:JM

Before the Civil Service Commission
County of Sacramento
State of California

In the Matter of the Implementation of Civil Service Commission Rule 7.10 for Appointment of Attorneys in the Office of the District Attorney.

FINDINGS AND ORDER RESCINDING THE COMMISSION'S FINDINGS AND ORDER OF SEPTEMBER 25, 1975

FINDINGS

I

On September 25, 1975, this Commission adopted its Findings and Order pursuant to Commission Rule 7.10 relating to appointments in the class of Attorney I in the Sacramento County District Attorney's office. Said order required that appointments in the class of Attorney I in the District Attorney's office be made on the basis of an alternating ratio of 2:1 so that at least one minority attorney would be appointed for every two non-minority attorneys. Said order further provided that said ratio would be applied only until the percentage of minority attorneys in the classes of Attorney I and Attorney II in the District Attorney's office reached 8%.

II

Before said order could be implemented, the District Attorney's office initiated legal action challenging the validity of said order and the validity of Rule 7.10, which action

has resulted in a decision by the California Supreme Court issued on January 25, 1980, upholding the validity of Rule 7.10, but remanding the case back to the Superior Court for further proceedings in accordance with the decision in *Price v. Civil Service Commission* (1980) 26 Cal.3d 257.

III

Because of the filing of said court action, said order has not at any time been implemented and Rule 7.10 has not in any way been utilized or applied as a basis for any appointment of any person to any position in the attorney classes used by the office of the District Attorney. However, as shown on the attached report from the Chief of the Special Employment Affirmative Action Division of the Department of Personnel Management, dated April 3, 1980, the number of minority attorneys employed by the District Attorney's office at the Attorney I and II levels has exceeded 8% of all attorneys employed at the Attorney I and Attorney II levels. The high point was reached on or about March 22, 1978, when the number of minority attorneys at the Attorney I level equalled 50% and the number of minority attorneys at the Attorney II level equalled 11.76%. As indicated in said report, on that date, of 23 attorneys at the Attorney I and Attorney II levels in the District Attorney's office, five were minority attorneys, resulting in a combined percentage of 21.7% minority attorneys at the Attorney I and Attorney II levels.

IV

The foregoing facts show that since the Commission's order of September 25, 1975, was issued, the 8% goal specified in said order has not only been reached, it has been substantially exceeded, as a result of the employment practices of the District Attorney's office, without any use of

an alternating ratio as a basis for attorney appointments pursuant to Rule 7.10 and without implementation of said Commission order of September 25, 1975.

V

As expressly provided in paragraph 2 of said Commission order of September 25, 1975, the 2:1 alternating ratio as a basis for appointment of minority attorneys was to " . . . be applied *only until* the percentage of minorities in the classes of Attorney I and Attorney II in the District Attorney's office is 8%." (Emphasis added)

VI

Subdivision (f) of Commission Rule 7.10 provides as follows:

> "(f) *An order may be rescinded* or revised from time to time by the Commission as it determines to be necessary or appropriate. *Such action may be taken by the Commission on its own motion* or at the request of any interested person. *In determining whether to rescind* or revise an order, *the Commission may consider any relevant information including* but not limited to the needs of the service, *changed circumstances*, problems encountered in implementing the order, and information which was not previously considered by the Commission." (Emphasis added)

VII

On the basis of the foregoing findings, and as expressly authorized by subdivision (f) of Rule 7.10, the Commission finds that because of changed circumstances, the Commission's findings and order of September 25, 1975, can serve no purpose which has not already otherwise been achieved. Said findings and order should therefore be rescinded.

ORDER

For the reasons set forth above, the Commission's findings and order of September 25, 1975, are hereby rescinded in their entirety and shall not be implemented nor be of any effect for any purpose whatsoever.

ADOPTED as the findings and order of the Civil Service Commission on the 24th day of April, 1980.

/s/ ARCHALENE A. MARTIN
for Raymond T. Butler
Chairperson, Civil Service
Commission of the County
of Sacramento

COUNTY OF SACRAMENTO
Inter-Department Correspondence

Date: April 3, 1980

To: Gerald M. Pauly
Director of Personnel Management

From: Clyde W. Rainwater, Chief
Special Employment Affirmative Action

Subject: District Attorney (Criminal I & II) Minority Representation 9/8/75 through 3/27/80

This list represents a random sequential sampling of minority attorneys in the District Attorney's office for the above period. The statistics reflect those minority attorneys on board approximately every other pay period through the period September 8, 1975 through March 27, 1980.

Date	Class	Total Attys.	Min. Attys.	Percentage of Total Min. Attys.
9-12-75	Attorney II	24	1	4.16
	Attorney I	10	0	0
2-26-76	Attorney II	26	1	3.84
	Attorney I	2	0	0
4- 1-76	Attorney II	26	1	3.84
	Attorney I	4	0	0
5-27-76	Attorney II	24	1	4.16
	Attorney I	3	0	0
9-22-77	Attorney II	7	0	0
	Attorney I	17	3	17.64
11- 3-77	Attorney II	9	0	0
	Attorney I	17	3	17.64
1-25-78	Attorney II	17	3	17.64
	Attorney I	4	0	0
3-22-78	Attorney II	17	2	11.76
	Attorney I	6	3	50.00
6-29-78	Attorney II	20	2	10.00
	Attorney I	9	1	11.11
10-26-78	Attorney II	18	2	11.11
	Attorney I	9	1	11.11
12-21-78	Attorney II	18	2	11.11
	Attorney I	11	1	9.09

(Table continued on following page)

(Table continued from preceding page)

Date	Class	Total Attys.	Min. Attys.	Percentage of Total Min. Attys.
2-15-79	Attorney II	12	2	16.66
	Attorney I	14	1	7.14
4-26-79	Attorney II	13	2	15.38
	Attorney I	8	1	12.50
6- 7-79	Attorney II	12	1	8.33
	Attorney I	12	1	8.33
10-25-79	Attorney II	14	0	0
	Attorney I	13	1	7.69
12-20-79	Attorney II	19	1	5.26
	Attorney I	8	0	0
2-14-80	Attorney II	18	1	5.55
	Attorney I	10	1	10.00
3-27-80	Attorney II	19	1	5.26
	Attorney I	9	1	11.11

cc: Herb Jackson, District Attorney
Tom Darling, County Counsel

Supreme Court, U. S.
FILED
SEP 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-1996

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO,
Petitioner

vs.

THE SACRAMENTO COUNTY CIVIL SERVICE COMMISSION, and
THE SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Respondents

REPLY BRIEF FOR PETITIONER

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No. 79-1996

In the Supreme Court

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OCTOBER TERM, 1979

DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO,
Petitioner

VS.

THE SACRAMENTO COUNTY CIVIL SERVICE COMMISSION, and
THE SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Respondents

REPLY BRIEF FOR PETITIONER

I

PETITIONER PROPERLY INCLUDED, AND REFERRED TO, THE OPINIONS OF THE LOWER STATE COURT DECISIONS

Rule 23, Section (k) of the Rules of the Supreme Court of the United States requires that a Petition for Writ of Certiorari contain a "copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, . . ." Further, Section (f) requires that the Petition specify how, in what manner, and at what stage, the federal questions were raised in the courts below.

Obviously, Petitioner's reference to the California District Court of Appeal decision was not only not misleading, but was required.

II

BECAUSE COMMISSION RULE 7.10 IS IN EFFECT AND AUTHORIZES FURTHER QUOTA HIRING ORDERS AGAINST PETITIONER, THE CONTROVERSY IS NOT MOOT

Commission Rule 7.10 (hereinafter Rule) is in full force and effect and capable of authorizing further quota hiring orders against Petitioner and, therefore, the controversy between the parties is not moot. The Respondents assert that the matter is moot because the Commission's Order of September 25, 1975, (hereinafter Order) is no longer in existence in that:

> a. the percentage of minority attorneys in Petitioner's office in the relevant classes reached the Order's quota of 8% numerous times during the pendency of the action; and
>
> b. the Civil Service Commission (hereinafter "Commission") rescinded the Order on April 24, 1980.

Respondent's totally overlook that the *central issue in this controversy* is the constitutional and statutory *validity of Rule 7.10,* and not the Order which the Rule authorized. The Trial court held that the Rule itself, as distinguished from the Order, was unconstitutional on its face. The District Court of Appeal determined that it violated the federal Civil Rights Act. The California Supreme Court then found it statutorily and constitutionally valid under state and federal law. Any inoperation or rescission of the particular Order which precipitated this lawsuit has absolutely no effect on the viability of the dispute between the parties over the validity of the Rule. *Although the Order may have died, the Rule lives.*

It is interesting to note, that while this matter was pending in the state courts (for over four years) the Respondents at no time either raised the mootness issue or rescinded the Order. According to the Inter-Department

Correspondence dated April 3, 1980 (Respondents' Brief, Exhibit A-6), the required minority hiring quota of 8% or more was reached at least as early as September 22, 1977*, and yet neither the mootness issue was raised, nor the Order rescinded, *until after the California Supreme Court decision became final on March 20, 1980.* It is obvious that the Commission's Rescission Order was simply a means of attempting to weaken Petitioner's position in seeking review by this court. It is equally obvious that justice dictates such tactical maneuvers should be ignored.

Even if the validity of the Order were the central issue (which it is not), it is well settled that voluntary abrogation of such orders, which are central to a dispute, should not be permitted to frustrate a meritorious resolution of the issues. To prevent that very tactic, this court has held that a mootness claim will not lie where the orders involved are "capable of repetition, yet evading review" if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Securities and Exchange Commission v. Sloan* 436 U.S. 103, 108-109 (1978).

A somewhat parallel issue arose in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). In that case, a state board of regents propagated a loyalty oath under authority of a statutory and regulatory scheme, the required signing of which was a condition of employment. Prior to the trial, the particular disclaimer requirement was withdrawn. However, the underlying authority for such conditions remained in existence. This court held that "(t)he change

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*The Correspondence shows 3 minority attorneys out of 24 in the Attorney I and II classes, or 12.5%.

in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned" oath. (385 U.S. at 596).

The inherent problem presented by short term and rescinded orders was also addressed in *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). It dealt with the validity of a judicial order restricting pretrial publicity which expired on its own terms upon impanelment of the jury. The trial was already completed when this court rejected the mootness argument because the issue of restrictive orders was capable of repetition.

Numerous other cases have rejected a claim of mootness under similar circumstances, *Gannett Company, Inc. v. De Pasquale,* 443 U.S. 368 (1979); *Division 1287 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America v. State of Missouri,* 374 U.S. 74 (1974); *Allee v. Medrano,* 416 U.S. 802 (1974).

This court has noted that "(t)he difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbitt v. United Farm Workers,* 442 U.S. 289, 297 (1979). However, where concrete issues are generated by a real and substantial controversy, the test is met. The dispute as to whether the Rule and the orders it authorizes are statutorily and constitutionally valid is definite and concrete.

The burden of demonstrating mootness "is a heavy one" *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). This burden clearly has not been met.

III

PETITIONER HAS STANDING TO CHALLENGE THE VALIDITY OF RULE 7.10

The California District Court of Appeal held under the "law of the case" doctrine by the California Supreme Court, that the Petitioner has standing to challenge a civil service restriction upon his power to appoint deputies upon their relative merit. *Price v. Civil Service Commission,* 26 Cal.3d, 257, 267 n.5d. Since the Petitioner is affected by the operation and implementation of Rule 7.10, he has a personal stake in the outcome and is entitled to attack it's constitutionality. *Board of Education v. Allen,* 392 U.S. 236 (1968).

Petitioner's standing is in no way affected by either the inoperation or rescission of the Commission's Order. As stated above, the Rule is alive and well. Where there is a continued interest in restraining the enforcement of a discriminatory law the controversy is concrete. *Hicklin v. Orbeck,* 437 U.S. 518 (1978). Respondent's bear a heavy burden in refuting the standing of Petitioner. *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

Respondents' Brief stressed that the Order was never actually applied to Petitioner's office and therefore, somehow, the Petitioner lacks standing. The Order was not actually applied because Petitioner filed suit and sought and received a restraining order prohibiting the implementation of the Order. It is not meritorious to now argue that because the Order was never implemented, that Petitioner does not have standing to attack the Rule on statutory and constitutional grounds.

IV

THE MINORITY QUOTA HIRING PROGRAM AUTHORIZED BY RULE 7.10 IS NOT VOLUNTARY

Respondents maintain that the minority quota hiring program is "voluntary" since it could be applied to all county civil service employees. The California Supreme Court agreed, stating that the Petitioner's disagreement with the Rule "does not, of course, render the plan 'involuntary' any more than the disagreement of one of a private employer's foreman or department heads would render a plan adopted by the responsible official of such an employer involuntary." Such an argument ignores that the Petitioner, an elected official, has sworn responsibilities to his constituents to perform his duties *to the best of his ability.* He has an obligation to hire the *best qualified personnel available,* and the forced quota hiring program authorized by Rule 7.10 simply does not permit him the power to do so. It is irrational to claim that he is similarly situated to a "foreman" or a "department head", both of whom serve their private employer. The private employer chooses foreman and chooses department heads and has the authority to direct their work. The Petitioner, an elected District Attorney, is responsible to the citizens whom he serves and the laws he is sworn to uphold.

V

FULLILOVE v. KLUTZNICK INVOLVES SIGNIFICANTLY DIFFERENT ISSUES THAN THOSE PRESENTED IN THE INSTANT PETITION

The "minority business enterprise" provision of the Public Works Employment Act of 1977 upheld in the recent case of *Fullilove v. Klutznick,* ..... U.S. ....., 48 U.S. Law Week 4979 (1980) is dissimilar to the quota hiring program authorized by Rule 7.10. *Fullilove* involved a constitutional attack on a congressionally authorized federal aid pro-

gram. The program conditioned receipt of public works grants upon agreement by the grantee that at least 10 percent of the funds would be set aside for contracts with minority businesses.

This court, in *Fullilove,* repeatedly stressed the narrowness of the holding and stated, "(h)ere we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and President. . . . The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. . . . The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity." 48 LW at 4986. The case was expressly limited to a consideration of congressional authority.

In the instant matter, Rule 7.10 permits the imposition, by a *local, non-elected Commission, of fixed racial quotas in government employment without regard to any other considerations.* Clearly, *Fullilove* does not affect the statutory or constitutional validity of a county civil service rule such as Rule 7.10

CONCLUSION

For the reasons discussed above, this case has not become moot; the Petitioner does have standing to attack the validity of Rule 7.10 in this Court; and the Petition for Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner